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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 31

H. P. DUGAN, EDWIN F. SULLIVAN and JAMES M. INGLES,

Petitioners,

vs.

EVERETT G. RANK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

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IN THE

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No. 31

H. P. DUGAN, EDWIN F. SULLIVAN and JAMES M. INGLES,

Petitioners,

vs.

EVERETT G. RANK, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS.

I.

OPINIONS IN THE COURT BELOW.

In addition to the opinions cited in petitioners' brief the following opinions in the Courts below involve this case:

Rank v. Krug, 90 F. Supp. 773 (1950), which case has been cited with approval by *this* Court[1] and involves many of the issues in this case.

Rank v. United States, 16 F. R. D. 310 (1954);

City of Fresno v. Edmonston, 131 F. Supp. 421 (1955);

[1]"22. United States District Court, Southern District of California rendered a decision on April 12, 1950, in Rank v. Krug, 90

Holsinger v. City of Fresno, 246 F. 2d 263 (9th Cir.) (1957);

United States v. United States District Court, 206 F. 2d 303 (9th Cir.) (1953);

California Water Rights Board Decision No. D-935, June 2, 1959.

II.
JURISDICTION.

We agree with and refer to petitioners', Bureau of Reclamation officials, statement in this regard.

III.
THE CONSTITUTIONAL PROVISIONS, STATUTES AND DOCUMENTS WHICH THE CASE INVOLVES.

A. Constitution of the United States.

1. First and Fifth Amendments to the Constitution of the United States (See Appendix page 1)

B. Acts of Congress.

1. Act of March 3, 1877, 19 Stat. 377 (see Appendix page 3)
2. Act of June 17, 1902, 32 Stat. 388 at 389-390, Secs. 4 and 8 (43 U. S. C. 391) (see Appendix page 5)
3. Act of April 16, 1906, 34 Stat. 116 and 117 (see Appendix page 5)

F. Supp. 773, consistent with the views we take of the issues here involved."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 70 S. Ct. 955, 970, 94 L. Ed. 1231 (1950).

4. Act of June 10, 1920, 41 Stat. 1063 at 1077 see Appendix page 6)
5. Act of December 5, 1924, 43 Stat. 672 at 702 (see Appendix page 6)
6. Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (see Appendix page 7)
7. Act of August 30, 1935, 49 Stat. 1028 and 1038 (see Appendix page 7)
8. Act of June 22, 1936, 49 Stat. 1597 at 1622 (see Appendix page 8)
9. Act of August 26, 1937, 50 Stat. 844 at 850 (see Appendix page 9)
10. Act of August 4, 1939, 53 Stat. 1187 at 1194 (see Appendix page 10)
11. Act of October 17, 1940, 54 Stat. 1198 and 1200 (see Appendix page 11)
12. Act of December 22, 1944, 58 Stat. 887 at 889-890 (see Appendix page 12)
13. Act of June 29, 1948, 62 Stat. 1112 at 1126 (see Appendix page 12)
14. Act of October 14, 1949, 63 Stat. 852 and 853 (see Appendix page 13)
15. Act of September 26, 1950, 64 Stat. 1036 (see Appendix page 13)
16. Act of July 10, 1952, 66 Stat. 516 at 560 (see Appendix page 14)
17. Act of July 2, 1956, 70 Stat. 483 at 484 (see Appendix page 15)
18. Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(d) (see Appendix page 15)
19. Federal Rules of Civil Procedure (28 U. S. C.) Rule 75(i) (see Appendix page 15)

C. State of California Constitution and Statutes.

1. California Constitution, Article XIV, Sec. 3 (see Appendix page 16)
2. California Water Code Sections: 104, 106, 1254, 1460, 10500, 10504, 10505, 11126, 11127, 11128, 11207, 11225, 11226, 11460, and 11463 (see Appendix pages 17-21)
3. Statutes of California, 1933, 50th Session, Chapter 1043, 2643, 2644 and 2645. (Approved by the Governor August 5, 1933; initiative vote of People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934) (see Appendix page 23)

IV.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the determination of the limits of the statutory authority of administrative officials of the United States under the Constitution and Acts of Congress is a judicial or administrative determination.

2. Whether the determination of whether petitioners, United States Bureau of Reclamation officials, in this case are acting in excess of and in violation of the authority granted them by the Constitution, the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress providing for the construction and operation of the Central Valley Project in California is a judicial or an administrative determination.

3. Whether the petitioners, United States Bureau of Reclamation officials, in the construction and operation of the Central Valley Project are acting illegally, ar-

bitrarily, unreasonably, capriciously and in excess of and in violation of the authority granted and conferred upon them by the Constitution, the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and the other Acts of Congress providing for the construction and operation of the Central Valley Project of California which require said Bureau of Reclamation officials to proceed in conformity with State laws relating to the ownership, control, use, appropriation or distribution of water in the construction and operation of the Central Valley Project of California.

4. Whether petitioners, United States Bureau of Reclamation officials, are required by the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), as amended, and other Acts of Congress relating to the construction and operation of the Central Valley Project of California are bound by and *are required to obey and carry out municipal and domestic water priority laws of the State of California in the construction and operation of the Central Valley Project;* and whether petitioners, United States Bureau of Reclamation officials, are acting illegally and in excess of and in violation of the authority conferred upon them by the Constitution and said Acts of Congress in failing and refusing to carry out such laws.

5. Whether the petitioners, United States Bureau of Reclamation officials, are required by the Basic Reclamation Act of June 17, 1902, as amended, and the other Acts of Congress relating to the construction and operation of the Central Valley Project of California and particularly by the Act of October 14, 1949, 63 Stat.

852 at 853, *to reserve for those California counties of origin of river waters and watersheds where river waters originate sufficient water to satisfy the needs of said counties and watersheds in which water originates* before taking and exporting said water out of the county and watershed of origin and particularly whether petitioners, Bureau of Reclamation officials, are required by said laws to reserve sufficient water for the respondents owning riparian lands and percolating water rights along the San Joaquin River between Friant Dam and Gravelly Ford Canal for Tranquillity Irrigation District and *for respondent City of Fresno for its domestic and municipal water uses, which city lies in both the county of origin and watershed of the San Joaquin River.*

6. Whether under the Basic Reclamation Act of June 17, 1902, 32 Stat. 388 (43 U. S. C. 391), and other congressional statutes involving the Central Valley Project where petitioners, Bureau of Reclamation officials, having consented to an order of the court ordering the parties to make a "physical solution" and having thereafter presented to the Court a plan of physical solution and in their answer having asked the Court to determine which lands of respondents have riparian and percolating water rights and having requested the District Court in their answer to make a decree giving such respondents water of the San Joaquin River to which they were legally entitled, and all other parties to this action having requested the Court to make a physical solution, *did the District Court have power to order the physical solution it decreed in this case.*

7. Whether even Congress itself can authorize the taking by petitioners, Bureau of Reclamation officials,

by eminent domain or condemnation proceedings of respondent City of Fresno's right to a surface supply of water for domestic and municipal uses and its underground percolating water supply percolating from the San Joaquin River which is admittedly pumped, used and is vitally needed for domestic and municipal uses by its citizens for maintenance of their lives and health for secondary agricultural uses by the irrigation districts, parties herein, *where the City has no other available domestic and municipal supply of water.*

8. Whether the taking of private property for public use by an officer of the United States *not authorized by some Act of Congress is an act of the Government and constitutes a taking by eminent domain* for which damages may be recoverable in either condemnation or eminent domain proceedings.

9. Whether the United States has taken any of the water rights of Respondents to water of the San Joaquin River by either eminent domain or condemnation.

10. Whether where the question of public purpose has been decided the amount and character of the water and water rights to be taken for a reclamation project and the need for the acquisition of particular water rights to complete the integrated plan rests in the discretion of Congress or in the discretion of administrative United States Bureau of Reclamation officials.

11. *Whether respondent City of Fresno and other cities of the nation under the Constitution of the United States are entitled to a judicial review of orders of administrative officials of the United States charging unreasonable, arbitrary and illegal rates for muni-*

pal and domestic water out of Bureau of Reclamation and other Governmental water supply projects.

12. Whether an action to determine whether rates for municipal and domestic water charged by Bureau of Reclamation officials is arbitrary; unreasonable, illegal and beyond the authority conferred upon them by Congress is a suit against the United States.

13. Whether petitioners, United States Bureau of Reclamation officials, where Congress has provided that the Central Valley Project shall provide water for domestic and municipal purposes to the cities in the service area of the Central Valley Project, and the City of Fresno is in the service area of the Central Valley Project, can arbitrarily deny respondents, City of Fresno, necessary water for domestic and municipal purposes.

14. Whether the present action is a suit against the United States and if so whether the United States has waived its immunity to suit.

15. Whether petitioners, Bureau of Reclamation officials, can raise questions for the first time in their brief on certiorari which were not set forth in their petition for certiorari and particularly whether petitioners, Bureau of Reclamation officials, can now raise the question of whether the Secretary of the Interior is an indispensable party where the question was not raised in their petition for certiorari.

16. Admitting that under the Central Valley Project the owners of riparian lands between Gravelly Ford Canal and the owners of the overlying percolating water rights within the Lee Line were to continue to receive water from the San Joaquin River under the

Central Valley Project, whether the determination of the amount of water to which such riparian or overlying percolating water owners were entitled to is a judicial or administrative matter.

V.

STATEMENT OF THE CASE.

Petitioners make the same statement made by petitioners the City of Fresno at page 14 of its brief, in the companion case No. 51, October Term, 1962, of this Court which is incorporated by reference herein, particularly to the maps therein showing the location of the various features of the Central Valley Project.

In addition to the statement in our brief in case No. 51, respondents wish to briefly point out the following additional facts:

A. Errors in Petitioners' Statement Pointed Out.

While most of these errors might be considered minor, naturally we feel that we should give a corrected version of the same.

At page 8 of petitioners' brief appears the following statement:

> "Friant Dam was put into operation October 20, 1941."

We believe the District Court correctly stated this matter when it held:

> "Construction was started on Friant dam on November 3, 1939. A very small quantity of water was impounded during construction in October, 1941 below the valves which are the outlet to the San Joaquin river. The valves to the river bed were partially closed, and the first diversion of water

to the Madera canal was made in 1944. The first diversion to Friant-Kern canal was made in 1949. The date of the completion of the dam is uncertain. It was not completed prior to the filing of the within suit in September, 1947."

Rank v. (Krug) United States, 142 F. Supp. 1, 44, R. 22.

At page 10 of petitioners' brief appears the following statement:

"The State of California * * * reversed its position in 1951 and has since opposed the claim for injunctive relief as destructive of the Central Valley Plan."

Although the state did oppose a complete injunction enjoining petitioners from in any way interfering with the flow of the San Joaquin River, it specifically asked for the conditional injunction decree of physical solution.

The physical solution decreed by the District Court is but a conditional injunction.

"The California courts, confronted with the command of the 1928 Constitutional amendment that water should not be wasted, * * * evolved a type of decree that for the sake of convenience is called a 'physical solution.'

"In essence, *such a decree is but the conditional injunctive decree of a court of equity.*" (emphasis ours)

Rank v. (Krug) United States, 142 F. Supp. 1, 162, R. 22.

In its answer to the complaint in 1951 and continuously throughout the trial against the petitioner officials, which for practical purposes closed against them in July, 1953, the State of California took the position that it was the *duty of the Court to make a physical solution, i.e.*, grant a conditional injunction. We quote from the answer of the State of California to plaintiffs' complaint filed October 16, 1951.

> "* * *. Alleges that under the circumstances in this action *it is the duty of the Court to determine whether there is a physical solution* whereby the plaintiffs may be supplied with the water which they may put to reasonable and beneficial use by reasonable methods of use and by reasonable methods of diversion. Alleges that it is in the public interest of the People of the State of California that the rights, if any, of the plaintiffs be protected by such a *solution* if the same is physically possible and feasible. *Alleges that a physical solution or solutions are possible* and *feasible* and that such solution or solutions will be offered to the Court by the Intervenor, as provided in the order of the Court dated August 29, 1951." (emphasis ours)
>
> R. 149. Answer of State of California.

At the pre-trial conference Mr. Arvin Shaw, noted water authority and Deputy Attorney General of the State of California, made the following statements:

> "Mr. Shaw. Under the decisions of the Supreme Court of California the question of *physical solution* is one which may be in this case the major question which the courts has to determine,

granting that there can be subsidiary and collateral things which the court must direct its attention to ultimately.

"* * *

"Mr. Shaw. * * * a large amount of technical and expert testimony may be eliminated, if the court would care to direct the order of proof at the trial, first to the issue of *physical solution.*" (emphasis ours)

Rep. Tr. 16-17, Pre-Trial Conference, December 20, 1951.

The State of California also gave its consent to the consent order modifying temporary restraining order dated August 29, 1951, directing all parties to make a physical solution.

"12. Plaintiffs, the State of California, and the defendant officials of the Bureau of Reclamation are directed on or before December 15, 1951, to prepare and serve upon counsel of record for each party hereto their respective plans for a physical solution of the problem of supplying water for irrigation and domestic purposes * * *."

Consent Order Modifying Temporary Restraining Order, page 4, filed August 29, 1951.

The State of California prepared and introduced into evidence a plan of physical solution [R. 2344, Ex. Cal.-H, Rep. Tr. 1676].

At page 10 of petitioners' brief the following incorrect statement also appears.

"* * *. The fifteen irrigation districts * * * which had contracted with the United States to receive water by virtue of the operation of Friant Dam * * * likewise opposed the injunction."

This also is not true, as all but three of said irrigation districts in their answers requested "* * * that a physical solution if possible be directed;" [R. 174, Answer of all defendant irrigation districts except Madera Irrigation District, Chowchilla Water District and Southern San Joaquin Municipal Utility District]. Moreover, at the pre-trial conference counsel for Madera Irrigation District and Chowchilla Water District also asked for a physical solution.

> "Mr. Green: * * * then let us try this *physical solution* within the limits of the boundaries of the people whom he represents as surface diverters, because they are in a different category than the people below the point at Gravelly Ford." (emphasis ours)
>
> Statement of Counsel Denslow Green, counsel for Madera Irrigation District, and Chowchilla Water District, Rep. Tr. 306.

Mr. Reavis, representing the Southern San Joaquin Municipal Utility District, in his written pre-trial statement filed January 29, 1952, specifically approved a physical solution.

> "While not incorporated in our Answer, *we are in harmony with the efforts of the respective parties to achieve a physical solution* of the problem of the riparian owners between Friant and Gravelly Ford, and will, during the trial, offer an expert witness to support one or more of the proposed plans for the physical solution heretofore submitted to the Court." (emphasis ours)
>
> Written Pre-Trial Statement of J. O. Reavis, Attorney for Southern San Joaquin Municipal Utility District, filed January 29, 1952.

B. History of Respondent City of Fresno's Efforts to Obtain a Supplemental Water Supply From the San Joaquin River.

As stated in our opening brief, the City of Fresno claims water out of the Central Valley Project on two grounds (1) that it is in both the County of Origin and Watershed of the San Joaquin River and is entitled to the protection of the California County of Origin and Watershed Protective Acts and the Act of Congress of October 14, 1949[2] and *(2) because it is desperately in need of water and is in the service area of the Central Valley Project, a primary purpose of which project is to furnish water for municipal and domestic purposes.*

The first grounds are discussed, *infra*, in this brief under the chapter entitled "Argument" and also in Petitioners' brief in case No. 51 before this Court. The second ground is discussed in Petitioners' opening brief in case No. 51 under the chapter entitled "City of Fresno and its Water Supply" beginning at page 77 thereof.

The continuous efforts of the City of Fresno for thirty years to obtain a supplemental water supply for its municipally owned water system are here set forth.

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[2] "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.

"* * * the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853 (1949).

In 1930 the City of Fresno condemned and took over the water company serving the City of Fresno at a total purchase price of $2,450,000.00. The city's municipal water plant now has a book value of $10,870,-129.00[3] which in this suit it seeks to protect from destruction.

Immediately upon the acquisition of the municipal water department in 1930 and 1931 the City of Fresno filed applications with State of California officials (Nos. 6771, 6772, 7134 and 7135 [R. 182-16]) to appropriate surplus water of the San Joaquin River for its municipally owned water department, which applications envisioned a 400,000 acre-foot capacity storage dam on the San Joaquin River in the approximate, if not exact, location of the present Friant Dam. An earth canal of slightly more than 200 cubic feet per second capacity, located on a contour substantially below the contour of the present Friant-Kern Canal, was to convey both stored and direct diversion waters from the storage dam to the City and surrounding areas [R. 2288, Pltf. Ex. 267]. It was also envisioned that the Fresno Irrigation District and Madera Irrigation District would jointly participate in the construction of said dam.

In 1933 by initiative vote of the people of the State of California December 19, 1933, the California State's water plan known as the Central Valley Project was adopted which provided for Friant Dam in the exact location of the proposed City of Fresno Dam, which foreclosed the project of the City as originally contemplated. The Central Valley Project as adopted

[3]Report of Fresno City Water Department, June 30, 1962.

by the Legislature, approved by the Governor and approved by initiative vote of the people of the State of California, became effective January 8, 1954 (Statutes of California, 1933, 50th Session, Chapters 1043, 2643, 2645).

A primary purpose of Friant Dam was to furnish water for "domestic use".

> "*Purposes.* Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and *domestic* use, and secondarily for the generation of electric power and other beneficial uses. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)
>
> California Water Code Sec. 11226.

In 1935 under the Emergency Relief Appropriation Act an appropriation was made whereby Congress took over the construction and operation of the Central Valley Project as a federal project (Emergency Relief Appropriation Act of 1935, 49 Stat. 115, Appendix page 7).

Under the Act of December 5, 1924, 43 Stat. 672, 702, President Roosevelt on December 2, 1935, signed the plan of feasibility which provided among other things that the Central Valley Project should be constructed as a reclamation project and that said project was to serve the cities of the San Joaquin Valley including the City of Fresno with water for domestic and municipal purposes. (See Feasibility Report of 1935 as set forth in *Rank v. Krug*, 90 F. Supp. 773,

823 (1950)). The entire Feasibility Report is also set forth in Brief of Petitioner in related case No. 51, *City of Fresno v. State of California, United States of America, et al.*, October Term, 1962, of this Court, at page 20 of the appendix to said brief.

By the Act of August 26, 1937, 50 Stat. 844, 850, the construction and operation of the Central Valley Project became a Bureau of Reclamation Project which provided that the project should supply water for "domestic uses".

> "* * *: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with state agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further*, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, *for irrigation and domestic uses*; and, third, for power." (emphasis ours)
>
> Act of August 26, 1937, 50 Stat. 844, 850.

This Court has also held that the Central Valley Project wa sto provide water for municipal and domestic use,[4] as did the feasibility report upon which the Central Valley Project Act is based. While keeping its applications to appropriate water in proper standing with the State of California officials the City of Fresno attempted to obtain a supply of water at a legal rate from the Central Valley Project to replenish its fast diminishing underground supply.

The Central Valley Project was to supply water to the six counties of the San Joaquin Valley including the City and County of Fresno.[5]

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[4]"The Central Valley basin development * * * includes * * * water * * * for *municipal* and miscellaneous purposes including *cities* * * *." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

"The object of the plan is to arrest the flow and regulation of its seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water, providing an adequate supply * * * for *municipal* and irrigation purposes, * * *." (emphasis ours)

Ivanhoe Irrigation District v. McCracken, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 2d 1313 (1958).

[5]"Prior to December 2, 1935, the defendant through the Bureau of Reclamation, Department of the Interior formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno*, Tulare, Kings and Kern in the State of California." (emphasis ours)

Gerlach Live Stock Co. v. United States, 111 Ct. Cls. 1 at 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

"7. The plan as formulated by defendant involved the irrigation of a large area of privately owned land nonriparian to the river situated both to the north and south of Friant in the California counties of *Madera, Merced, Fresno, Tulare, Kings and Kern.*" (emphasis ours)

Wolfsen v. United States, 162 F. Supp. 403 (1958).

The project was not designed to bring new lands into cultivation.[6]

Everything was going well with the City's effort to obtain water out of the Central Valley Project until the appointment of one Richard Boke as Regional Director of the United States Bureau of Reclamation in 1944. This man was not an engineer but was an entomologist who specialized in the study of termites, an ant-like insect which destroys the wooden foundation of buildings.[7]

He immediately began to destroy and undermine the foundations of the great Central Valley Plan as authorized by Congress. He was not an engineer but was given full authority to execute water service con-

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[6] "The project is *not* designed for bringing new lands into cultivation, but for the maintenance of existing agricultural development and existing civilization of a high type." (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

[7] "Mr. Bow: How long did you attend the University of Chicago?

"Mr. Boke: For approximately two years.

"* * *

"Mr. Bow: I believe you testified previously that that had particularly to do with *termites*.

"Mr. Boke: No, sir, I didn't testify to that effect. I testified to this effect: that Dr. Emerson is one of the greatest termite specialists in the world, and was rather interested in keeping me in the field of *termites*, so to speak, which I regarded in my case as rather too narrow because I was interested in all phases of environment in the area." (emphasis ours)

Investigation of Bureau of Reclamation, Department of the Interior, before the Committee on Expenditures, in the Executive Departments, House of Representatives, 80th Congress, 2nd Session, pages 795, 796.

tracts without even approval by his superiors in Washington.[8]

A congressional committee of Congress found that Mr. Boke was not qualified to administer the Central Valley Project.[9]

The old Bureau engineers who had successfully designed and constructed the Central Valley Project, Boulder Dam and the other great reclamation projects

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[8] "Q. Mr. Boke, what is your official position with the United States Bureau of Reclamation? A. Regional Director, Bureau of Reclamation, for Region 2 Sacramento.

"* * *

"Q. Well, as far as the Bureau of Reclamation is concerned and excluding flood control operations, have you full authority yourself to make any releases in the Central Valley Plan in California, at Friant or Shasta, as you deem necessary?

"* * *

"The Court: What he is trying to get at is, the long and the short of it, every time you change the flow of Friant Dam here, you don't have to get the consent of the Secretary of the Interior?

"The Witness: That is correct.

"The Court: Or Mr. Strauss, the head of the Bureau?

"The Witness: Not at all.

"The Court: That determination is made here?

"The Witness: Yes.

"Q. (By Mr. Rowe): You remember having lunch in Washington on April 17, with Mr. Winton, sitting in the back of the room, and Mr Earl Harris of Santa Cruz, do you not? A. Certainly.

"Q. You made a statement at that time that *you could do whatever you wanted in California*, as far as *contracting for water*, setting up flows, and releasing water from a dam, didn't you? A. That is generally my responsibility, yes.

"Q. Yes, *without appealing to any higher authority?* A. *Generally speaking, yes.*" (emphasis ours)

Testimony of Richard L. Boke, Rep. Tr. 599, 600.

[9] "* * * your committee has reached the conclusions, based on incontrovertible evidence, Mr. Boke does not possess the qualifications necessary to administer the gigantic Central Valley Project."

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 10 (August 4, 1948).

testified under oath that Boke and Chief of the Bureau Strauss had completely wrecked the Bureau's great staff.[10]

Mr. Boke and his superior Mr. Strauss, as chief of the Bureau of Reclamation without authority of Congress, immediately began to vary the plans, size of the canals of the Central Valley Project and illegally added 338,000 acres of uncultivated lands to be served by the Central Valley Project[11] and executed contracts with the districts now before this Court in the related action of *Delano-Earlimart, et al., v. Everett G. Rank, et al.,* No. 115, October Term, 1962, of this Court. Mr. Boke and Mr. Strauss refused to sell water to the County of Fresno and refused to sell any municipal or domestic water to the City of Fresno out of Friant Dam due to a fight Boke got into with certain Fresno County residents other than those of the City of Fresno.

By this time due to their illegal actions Boke and Strauss had lost the confidence of Congress. By 1947 Boke and Strauss were openly violating the will of Con-

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[10]"Mr. Hodson. Yes; there has been a very quiet but nonetheless bitter controversy raging within the Bureau ever since * * * between the so-called old-time career Bureau people and on their ideas of what the Bureau is supposed to be doing, and the new group which has taken over control and management of the Bureau * * * Mr. Comstock talked to Mr. Bashore in Denver. He said that he was called into the office and given his choice to retire or be *kicked out*—so he retired—and the reasons were he would not go along on this new thinking and these new plans that the Bureau was putting into effect." (emphasis ours)

Investigation of the Bureau of Reclamation, Dept. of the Interior, in the Executive Depts., House of Representatives, 80th Congress, 2nd Session, page 746.

[11]"Millerton Lake will also provide 1,256,500 acre-feet (Class I and II) to the upper (southern) San Joaquin Valley as a supply for approximately 338,000 acres of presently dry land * * *." (emphasis ours)

R. 309 (new volume), Pltf. Ex. 136, 6570.

gress and themselves admitted that Congress no longer believed them. This caused the Secretary of the Interior to admit publicly that Congress did not trust them "like they used to."[12] Finally, *after the present action had been filed,* Congress having completely lost confidence in both Boke and Strauss in 1949 in an effort to get rid of Boke and Strauss attached a rider to the 1949 appropriation bill known as the Strauss-Boke Rider *cutting off their salaries* entirely.

"* * * Pursuant to the Harness Committee report, the same Congress adopted in the Interior Department Appropriation Act for 1949 the so-called 'Straus-Boke rider.' This act (Public Law 841, 80th Cong.; 62 Stat. 1112) * * *:

"[*Provided further,* That after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner of Reclamation; (2) Assistant Commissioner of Recla-

[12] "At the same Salt Lake City conference (1947) Secretary Krug made the following statements: 'This program is probably closer to my heart than any other in the Department of the Interior and as Mike (Michael Strauss, Commissioner of Bureau of Reclamation) pointed out to you for some strange reason people up in Congress *don't trust us like they used to* * * *.'" (emphasis ours)

Testimony of Secretary of the Interior Krug, Investigation of the Bureau of Reclamation, 19th Intermediate Report of the Committee on Expenditures of the Executive Department, pp. 555, 556.

mation; and (3) Regional Director of Reclamation.]"

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, pages 684, 685.

The congressional statute was applicable to both Boke and Strauss.

"The rider on the 1949 appropriation bill was applicable to both the Commissioner and the Regional Director in California, neither of whom was a professional engineer."

Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, page 685.

In the meantime, by request of the Secretary of the Interior, Julius A. Krug, in letter dated January 25, 1949, Commissioner Strauss and Regional Director Boke remained on the job, serving without pay after the restrictive date, January 31, 1949, for over a year. Both remained in office until March, 1953[13] in spite of the efforts of Congress to get rid of them.

Boke and Strauss attempted to justify their actions to Congress by claiming that they were persecuted by the private utilities. This is not true. Both of them had taken a particular aversion to the municipal water system of the City of Fresno and although in some instances they asked for facilities to distribute public power out of Shasta Dam, they completely failed to push for any power generating facilities in Friant

[13]Central Valley Project Documents, Part 2, Operating Documents, House Document 246, 85th Congress, 1st Session, page 686.

Dam provided for under the Central Valley Project act as originally adopted by the people of the State of California,[14] though not in the Feasibility Report of 1935, and many other dams on California rivers where hydroelectric power projects had been authorized by Congress.

We are not attempting to attack Mr. Boke personally. How we got into the Bureau of Reclamation is a story which though fascinating is not material here. We only seek to show that Mr. Boke and Mr. Strauss in attempting to illegally exclude the City of Fresno, to change the Central Valley Project and to disregard the rights of the landowners between Friant and Gravelly Ford, although representing to Congress that they were carrying out the congressional intent on the Central Valley Project, secretly and in violation of the will of Congress and in excess of the authority given them by Congress violated practically every provision of the Central Valley Project acts and the intent of Congress in their refusal to give the City of Fresno, the landowners between Friant and Gravelly Ford and Fresno County in general water to which they were entitled.

The City of Fresno in 1951 in desperation filed a complaint in intervention in this action which was allowed asking that their filings to appropriate surplus water be granted and that the Bureau of Reclamation sell them a badly needed supplemental water supply out of Friant Dam at a lawful rate as required by the

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[14] "Friant Dam shall be * * * used * * * primarily * * * for irrigation and domestic use and secondarily for the generation of electric power * * *."

California Stat. 1933, c. 1042, p. 2644, California Water Code Sec. 11226.

various acts of Congress covering the Central Valley Project.

In fairness to the present petitioning Bureau of Reclamation officials it should be stated, although not in the record, and occurring after the conclusion of the trial in this action, that these presently petitioning officials in an effort to rectify Boke's illegal actions in refusing the City of Fresno a water supply, in 1961 granted the City of Fresno a contract for 60,000 acre-feet of water at $10.00 per acre-foot *subject to an increase in the amount of water* and a *decrease in the price thereof* by the final decision of this Court in this case.

It will be remembered that this amount of 60,000 acre-feet is 40,000 acre-feet less than the 100,000 acre-feet which was the minimum amount of supplemental San Joaquin River water the Bureau of Reclamation officials' testified that respondent City of Fresno needed.[15]

It will also be remembered that this 60,000 acre-feet is strictly irrigation water with no municipal priority in dry years such as granted to the City of Sacramento, California, out of the Central Valley Project at a price lower than $10.00 per acre-foot.[16]

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[15]"The Court: He didn't say that. He said they could safely have a supply underground of 30,000, and would need another 100,000 acre-feet.

"Q. (By Mr. Rowe): Need another 100,000 acre-feet from another source?

"A. That is correct."

R. 1983, Testimony of Leland K. Hill, 15,613.

[16]The City of Sacramento recently signed a contract with the Bureau of Reclamation purchasing water out of the Central Valley Project at $9.00 an acre-foot containing the following provision:

"City water to be delivered to the City under this contract shall carry all priorities accorded to or for municipal uses

Although discussed in our brief filed in companion case No. 51, October Term of this Court, which has hereinabove been referred to by reference, we feel that a brief summary of the desperate need of the City of Fresno to the water supply which Congress gave it out of the Central Valley Project will be helpful to this Court.

C. The Need of the City of Fresno for an Additional Supply of at Least 100,000 Acre-Feet at a Reasonable and Legal Price.

The City of Fresno which is located in the watershed and county of origin of the San Joaquin River, part of whose wells are supplied by percolation from the San Joaquin River, now pumps it's entire municipal supply from the underground. The Bureau of Reclamation officials themselves have testified that the city of Fresno needs a supplemental water supply out of Friant Dam of at least 100,000 acre-feet of water[17] a year, and

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under the laws of the State of California and the United States will recognize such priorities."

Minutes of the City of Sacramento, pages 280-281, Volume 61 of Proceedings of the City Council—1957, dated the 27th day of June, 1957.

[17]"Q. How much surface in addition to the underground pumping would you say?

"The Court: 150,000 acre-feet of water?

"Mr. McPherson: 130,000 he said.

"The Court: 130,000?

"The Witness: Yes, your Honor. Probably from the underground supply that would be around 30,000 acre-feet and the rest would have to come from the surface.

"The Court: He didn't say that. *He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet.*

"By Mr. Rowe: Q. *In other words the City needs another 100,000 acre-feet from another source?*

"A. *That is correct.*

"Q. And, in your opinion, just so I can get it clear, the City

that the City of Fresno can safely pump only 30,000 acre-feet from its underground supply.[18] By 1959 it was pumping over 60,700 acre-feet a year[19] and has increased since then. The State of California's engineer testified in 1954 that the City of Fresno should only pump one-third of its supply from the underground and secure a supplemental surface supply for two-thirds of all its future water uses.[20]

The California Water Rights Board has the following to say on the City of Fresno's needs:

"Incontestable evidence supports the contention of both the City and the District as to existing

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of Fresno, using a slang expression, should get on the ball immediately and get water from somewhere?

"A. I think they definitely should. I think they have been dragging their feet for a long time.

"By Mr. Rowe: Q. Mr. Hill, then at the present time, from your own figures, if they are pumping 43,000 acre-feet in the City of Fresno now, and in the next 50 years you would only suggest pumping 30,000 ac e-feet, are they not overpumping in the City of Fresno 15,000 acre-feet now?

"A. They are definitely overpumping.

"A. Is that the amount; 15,000 acre-feet?

"The Court: It is all above 30,000?

"The Witness: Yes." (emphasis ours)

Testimony of Leland Hill, Rep. Tr. 15,614 and 15,615

[18]"The Court: He didn't say that. He said they could safely have a supply underground of 30,000 and would need another 100,000 acre-feet.

"By Mr. Rowe: Q. * * * needs another 100,000 acre-feet from another source?

"A. That is *correct*." (emphasis ours)

R. 1983, Testimony of Leland Hill, Rep. Tr. 15,613, 15,614.

[19]1959 Fresno City Water Department Report.

[20]"* * * we have to think of the future and the growth of the city, and my thought is at least two-thirds of the total requirements that the city could anticipate in the future should be derived from outside."

R. 1896, Testimony of Irvin M. Ingerson, Rep. Tr. 12,788, 12,789.

deficiencies in water supply. This deficiency is most graphically illustrated by the severe and sustained drop in ground water levels throughout the Unit in recent years indicating a continuous mining of water stored in the underground water basin comprising the Fresno Ground Water Unit (FID 7). The serious nature of the situation is unquestioned. Obtaining a supply to overcome present deficiencies will not long provide a solution to the problem inasmuch as the deficiencies are increasing at an ever increasing rate as new demands on the supply develop. Eventually new water sufficient to meet the present overdraft on the Unit and provide for its ultimate development must be forthcoming if the economy of the area is to flourish."

State of California, Water Rights Board, Decision No. D-935, Adopted June 2, 1959, p. 27.

The District Court also found that the City of Fresno's water supply had reached the critical point.[21]

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[21]The City of Fresno lies in a position of great natural advantage insofar as water is concerned; it is but a short distance from two rivers, the San Joaquin and the Kings, with a combined average annual flow of approximately 3,000,000 acre-feet. And yet, it is now in the anomalous position of being short of water to supply its inhabitants for the highest and best use, with the United States astride both rivers with gigantic dams exporting water to irrigation district in counties and watersheds other than the San Joaquin and Kings, which water it used not a primary supply, but as a supplemental supply for irrigation and agricultural purposes, declared by California law to be secondary to the highest and best uses of municipalities for domestic purposes.

Rank v. (Krug) United States, 142 F. Supp. 1, 185 (1956). R. 22

"Under the evidence the City of Fresno is in pressing present need of an additional supply of water for domestic and municipal purposes; *it is reaching the critical point.*"

Rank v. (Krug) United States, 142 F. Supp. 1, 184 (1956). R. 22.

The Court below affirmed this part of the District Courts decision. Nor has this finding of the District Court been attacked in Respondents Petition for Certiorari.

D. The Respondent Irrigation Districts Are Receiving Too Much Central Valley Project Water Under Their Contracts With the Bureau of Reclamation.

That the respondent irrigation districts are receiving too much Central Valley Project water under their contracts with the United States Bureau of Reclamation clearly appears from the huge jump in water levels as shown by the Bureau of Reclamation's own records; in one instance over 100 feet since the start of delivery of Central Valley Project water to them.

In making this assertion, however, we are not asking the Court to make a finding that any contract of any district is illegal or take any water away which they are receiving under the contract. *However*, in order that this Court have a clear picture of the true facts in the Central Valley Project, we point out one part of the opinion of the California Water Rights Board decision which shows that the districts, if they continue to receive the amount of water they are now taking under their present contracts, may water log and seriously damage their lands.

> With the exception of the Madera Irrigation District and Chowchilla Water District which have used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water

delivery contracts with the United States. This rise, coupled with notice of the quantities of water delivered, average probable future contractual deliveries, and acreages irrigated, presents a strong inference that *some readjustment downward of contractual quantities may ultimately be not only desirable but necessary to prevent water logging of valuable agricultural lands.*"

State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959.

As we stated, we do not agree with all findings of the California Water Rights Board, but the annual reports and the petitioning Bureau of Reclamation officials' own records in California show by the startling rise in water levels in the respondent irrigation districts' lands that the above portion of the opinion of the California Water Rights Board is correct.

E. Riparian Rights and Needs of the Landowners Between Friant and Gravelly Ford Canal.

The riparian rights of the landowners between Friant and Gravelly Ford Canal will be fully discussed under the chapter entitled "Argument".

F. Rights of the Landowners Having Percolating Underground Water Rights to Waters Percolating From the San Joaquin River Between Friant Dam and Gravelly Ford Canal.

The rights of overlying landowners having percolating underground water seeping on the alluvial cone of the San Joaquin River (Lee Line) between Friant Dam and Gravelly Ford Canal are discussed under the subsequent chapter entitled "Argument".

G. The Riparian Rights of Respondent Tranqillity Irrigation District.

There is no longer a dispute as to the riparian rights of respondent Tranquillity Irrigation District.[22] Petitioners recognize these rights and the District Court approved the petitioners' determination of the amount of these rights.

VI.
ARGUMENT.

In determining whether this is a suit against the United States or is an action to enjoin administrative officials of the United States from acting illegally and in excess and in violation of the authority conferred upon them by the Acts of Congress the following points should be considered by this Court.

A. The Determination of the Limits of the Statutory Authority of an Administrative Official Is a Judicial and Not an Administrative Decision as Erroneously Held by the Court Below.

That the determination of the limits of the powers of an administrative official such as those of petitioners, the Bureau of Reclamation officials, under the acts of Congress governing reclamation projects in general, and the Central Valley Project in particular, is a judicial and not an administrative determination is, we submit, too clear for argument.[23]

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[22] "1. Also intervening as plaintiff was the Tranquillity Irrigation District. This court is now advised that the dispute between this irrigation district and the Bureau of Reclamation has been resolved by agreement and no longer constitutes an issue upon appeal."

State of California, United States of America v. Rank, 293 F. 2d 340, 342 (1961) (Footnote 1).

[23] "* * *. The responsibility of determining limits of statutory

B. The Determination of Whether a Water Rate Charged by the Petitioner Is Reasonable or Unreasonable, Arbitrary, Illegal and in Excess of the Authority Conferred Upon Them by Congress Is a Judicial and Not an Administrative Decision, and Such a Suit Is Not a Suit Against the United States.

It is for the courts to determine whether a water rate charged for water out of a United States Reclamation Project is reasonable or unreasonable, arbitrary, capricious or illegal. This is a judicial, not an administration function.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912);

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authority of administrative agencies is a judicial function * * *." (Syllabus)

Stark v. Wickard, 321 U. S. 288, 310, 64 S. Ct. 559, 571, 88 L. Ed. 773 (1944).

"This suit alleges that the Secretary of Agriculture is disobeying a congressional mandate. Such allegation gives this court jurisdiction and the suit is not one against the United States * * *.

"(2) In this case the Secretary has disobeyed the congressional mandate."

Publicker Industries v. Anderson, 68 F. Supp. 532, 533 (1946).

"* * * where he (the head of a department) is directed by law to do a certain act affecting the absolute rights of any individuals, * * * the performance of which the President cannot lawfully forbid, * * * it is not perceived on what ground the courts of the Country are further excused *from the duty of giving judgment that right be done to an injured individual*, than if the same services were to be performed by a person not the head of a department." (emphasis ours)

Marbury v. Madison, 5 U. S. 137, 170, 2 L. Ed. 60 (1803).

"* * *. But public officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverably by appropriate action at law *or in equity*, he is not relegated to the Court of Claims, to recover a money judgment." (emphasis ours)

Land v. Dollar, 330 U. S. 731, 738, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

Yuma County Water Users' Ass'n v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922);

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72 (8th Cir.) (1914).

It will be observed in all of the above cases, neither the United States nor the Secretary of the Interior was a party and that all of said actions were for the determination of the question of whether the water charges from a Bureau of Reclamation Project were legal or illegal. Other cases supporting Respondents' position are as follows:

"12. The public have a right to be exempt from unreasonable exactions * * *." (Syllabus)

Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable * * *. But that involves an inquiry as to what is reasonable and just for the public. * * *. The public cannot properly be subjected to unreasonable rates * * *."

Covington & L. Turnpike Co. v. Sanford, 164 U. S. 578, 17 S. Ct. 198, 41 L. Ed. 560, 566 (1896);

Stark v. Wickard, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 773 (1944) (enjoining Secretary of Agriculture from enforcing unreasonable minimum milk prices set by him).

"* * * when a case arises in which it becomes necessary to determine whether a properly

established rate is a reasonable or constitutional *one, either to protect the public against excessive or unreasonable charges*, or its constitutional rights * * *, the courts may determine the reasonableness of such rate and may enjoin the enforcement of an unjust, unreasonable, rate." (emphasis ours)

43 Am. Jur. 693, 694.

It is submitted that as was stated by this Court there is no place in the American constitutional system for the exercise of such arbitrary power by the respondent Bureau of Reclamation officials as occurred here.

"In our view, this case resolves itself into a question of the power of the Secretary of the Interior * * *. But as has been affirmed by this court in former decisions *there is no place in our constitutional system for the exercise of arbitrary power*, and, if the Secretary has exceeded the authority conferred upon him by law then there is power in the court to resolve the status of the parties aggrieved by such unwarranted action." (emphasis ours)

Garfield v. United States, ex rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908).

"Arbitrary power and the rule of the constitution cannot both exist."

Jones v. Securities and Exchange Commission, 298 U. S. 1, 24, 56 S. Ct. 654, 661, 80 L. Ed. 1015 (1936).

1. Such an Action Is Not a Suit Against the United States.

It is submitted that under the decisions of this Court an action to determine whether water rates charged by the Bureau of Reclamation are reasonable or unreasonable, illegal or arbitrary, is not a suit against the United States.

Swigart v. Baker, 229 U. S. 187, 33 S. Ct. 645, 57 L. Ed. 1143 (1912).

Yuma County Water Users' Ass'n v. Schlecht, 262 U. S. 138, 43 S. Ct. 498, 67 L. Ed. 909 (1922).

"* * *. The questions whether or not the *charges* alleged to be illegal and the acts and threatened acts of executive officers depriving the shareholders of a water users' association of water * * * are justified by law, are questions of law which a court of equity is empowered to determine in a suit of such an association against such executive officers, although the Secretary of the Interior or other executive officers have already decided them.

"3. United States — 'Suit Against United States' Inference With Rights.

"A suit against executive officers of the United States to enjoin them from committing acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is not a 'suit against the United States', nor is it or the injunction south objectionable, either on the ground that they interfere with the property or the possession of the property of the United States. * * *." (emphasis ours)

Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 73 (8th Cir.) (1914);

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1927).

Additional authorities on this point are to be found at page 104 of brief filed by these Respondents in the companion case No. 51, October 1962 Term of this Court.

Neither does the decision of the District Court in this case "direct the disposition of property owned by the United States" as averred by opposing counsel at page 18 of their brief.

It is further submitted that the mere fact that the record title to the reclamation works is in the government or even if we assume that the title to the water is in the government and not in the respondent districts which it is not, the jurisdiction of this Court would not thereby be defeated as stated by this Court:

"* * * But public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law *or in equity*, he is not relegated to the Court of Claims to recover a money judgment." (emphasis ours)

Land v. Dollar, 330 U. S. 731, 739, 67 S. Ct. 1009, 1012, 91 L. Ed. 1209 (1946).

"Suits to restrain Secretary of Interior from enforcing his predecessor's orders limiting plaintiffs' water right appropriations in unit of federal reclamation project in alleged violation of plaintiffs' contracts with government held not dismissible for nonjoinder of United States as defendant

on ground that United States was owner of water rights and relief sought was substantially specific performance of executory contract with government, * * *.

"* * *.

"Exemption of United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, and in case of injury threatened by his illegal action, officer cannot claim immunity from injunction process."

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 413, 81 L. Ed. 525 (1937). (Syllabus)

"1. The fact that the legal title to allotable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickashaw Nations the name of one who has received an allotment certificate and is in the possession of the land." (Syllabus)

Garfield v. United States, ex rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908);

United States v. Lee, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171 (1882);

Ickes v. Fox, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937);

State of Nebraska v. State of Wyoming, 325 U. S. 589, 65 S. Ct. 1332, 89 L. Ed. 1815 (1945).

Finally, title to the water in the Central Valley Project is not in the government but in the landowner subject to prior rights of original plaintiffs.

> "* * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."
>
> Act of June 17, 1902, 32 Stat. 388, 390, 43 U. S. C. Sec. 391.

Congress in its legislation regarding the Central Valley Project again reaffirmed the above provision and provided that the water from a reclamation project is appurtenant to the land and therefore owned by those landowners being served from the project.

> "* * *. That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."
>
> Act of July 2, 1956, 70 Stat. 483, 484.

Moreover, this is the holding of this Court.

> "Section 8 of the Reclamation Act of June 17, 1902, 43 U. S. C. A. 372-382, provided: * * * that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated. * * *. We can say here what was said in Ickes v. Fox, supra, 300 U. S. pages

94 and 95, 57 S. Ct. page 416, 81 L. Ed. 525: 'although the government diverted, stored and distributed the water the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government but under the Reclamation Act for the use of the landowners, and by the terms of the law and of the contract already referred to *became the property of the landowners* wholly distinct from the property right of the government in the property right of the government in the irrigation works. Compare Murphy v. Kerr, (D. C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (Id.) with the right to receive the sums stipulated in the contract as reimbursement * * *.'" (emphasis ours)

State of Nebraska v. State of Wyoming, 325 U. S. 589, 613-614, 65 S. Ct. 1332, 1349, 89 L. Ed. 1815 (1945);

Ickes v. Fox, 300 U. S. 82, 95, 57 S. Ct. 412, 416, 81 L. Ed. 525 (1937).

2. Cases Cited by Petitioners Sustain Respondents' Position, Not Petitioners'.

The decision of *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), *Land v. Dollar*, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209, and *Malone v. Bowdoin*, 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962), cited by petitioners do not sustain peti-

tioners' position, but the position of respondents as shown by the following quotations from these cases:

> "6. Where the right to possession or enjoyment of property under general law is in issue, and the defendants claim as officers or agents of the sovereign, the rule of United States v. Lee, supra, has been repeatedly approved. * * *. That rule is applicable here although we assume that record title to the shares is in the United States and its officers were in possession. The force of the decree in that case was to grant possession to the private claimant. * * *."
>
> *Land v. Dollar*, 330 U. S. 731, 67 S. Ct. 1009, (1946) (Syllabus).

We quote also from *Malone v. Bowdoin*, 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962):

> "Action of a federal officer affecting property claimed by a plaintiff can be made basis of a suit for specific relief against the officer as an individual only if the officer's action is not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case are constitutionally void."
>
> *Malone v. Bowdoin*, 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962) (Syllabus).

> "* * *. Nor has it been asserted that the petitioner was exceeding his delegated powers as an officer of the United States * * *."
>
> *Malone v. Bowdoin*, 369 U. S. 643, 82 S. Ct. 980, 984, 8 L. Ed. 2d 168 (1962).

The same distinction appears in *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), cited by petitioners. We quote:

> "* * *, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the lack of delegated power. * * *.
>
> "A second type of case is that in which the * * * order conferring power upon the officer * * * is claimed to be unconstitutional."
>
> *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 689, 69 S. Ct. 1457, 1461, 93 L. Ed. 1628 (1949).

> "* * *. But the general statute permitting suit in the Court of Claims in certain instances against the Government is not a statute that provides that remedies otherwise at plaintiffs' command are to be displaced. A holding that the availability of action for monetary damages in the Court of Claims against the United States prevents a suit at law, * * * if the necessary requisites for equity jurisdiction are present, in equity, against the gov-

ernmental agent, would be as novel as it is indefensible * * *."

Larson v. Domestic & Foreign Commerce Corp., 337 U. S. 682, 722-723, 69 S. Ct. 1457, 1478, 93 L. Ed. 1628 (1948).

As shown by the following quotation from the pleading of respondents, not only was it specifically alleged that the acts of Petitioners were in excess of the statutory authority conferred upon them by Congress but the specific Congressional statutes and state laws which they are violating are clearly set forth. We quote:

"That said illegal and unlawful impounding and storage of water in said Friant Dam and said illegal and unlawful diversions and said threatened illegal and unlawful diversions, transportation and uses of said water of the San Joaquin River by defendants, as aforesaid, are and will be wholly without right and illegal and unlawful and in excess of the authority of said defendants and in excess of the authority conferred upon defendants by those certain Acts of Congress known as 'The Basic Reclamation Act of June 17, 1902', as amended (43 U.S.C., Sec. 391, 411, as amended); Act of August 30, 1935, (49 Stat. 1028, 1038); the Act of June 22, 1936 (49 Stat. 1597, 1622); the Act of August 9, 1937 (50 Stat. 564, 592, 597); the Act of August 26, 1937 (50 Stat. 844, 850); the Act of March 2, 1938 (52 Stat. 83); the Act of May 9, 1938 (52 Stat. 291, 318, 319 and 324); Joint Resolution of June 21, 1938

(52 Stat. 809, 811 and 816); Act of May 10, 1939 (53 Stat. 685, 714 and 719); Act of August 4, 1939 (53 Stat. 1187, 1192, 1194 and 1197); Act of April 6, 1940 (54 Stat. 82, 87); Act of June 18, 1940 (54 Stat. 406, 432, 433, 437, 438); Act of October 17, 1940 (54 Stat. 1198, 1199); Act of June 28, 1941 (55 Stat. 303, 331 and 336); Act of [1072] July 30, 1941 (55 Stat. 810, 826); Act of July 8, 1942 (56 Stat. 650); Act of July 12, 1943 (57 Stat. 451, 472, 476); Act of June 28, 1944 (58 Stat. 463, 486, 487); Act of December 22, 1944 (58 Stat. 887, 888, 889, 890, 891 and 901); Act of July 25, 1947 (61 Stat. 460, 475) and Amendment to said foregoing Acts; the Constitution and other Laws and Statutes of the United States of America, or Section 3, Article XIV of the Constitution of California, the Water Code of California and particularly Sections 1201, 1254, 1460, 1463, 1701, 1706, 103, 6.029, 11.460, 11,461, 11463 of said Water Code and other Laws and Statutes of the State of California; that said threatened and intended illegal impounding storage diversions, transportation and uses by said defendants of said waters of said San Joaquin River, as aforesaid, will cause the City of Fresno and its inhabitants great and irreparable loss, injury and damage, all as aforesaid."

R. 182-10, 11. Complaint in Intervention of City of Fresno.

C. Since the Determination of Whether Charges for Water From United States Reclamation Project Are Unreasonable, Arbitrary and in Excess of Authority of Petitioners Conferred on Them by Congress Is a Judicial and Not an Administrative Determination and Since Petitioners in Their Petition for Certiorari Did Not Attack the Validity of the District Court's Finding That a Charge in Excess of $3.50 Per Acre-Foot to the City of Fresno Was Unreasonable, Arbitrary or Illegal, the District Court's Finding That Any Charge to the City of Fresno for Irrigation Water in Excess of $3.50 Per Acre-Foot Was Unreasonable Must Stand.

Having shown that the determination of whether a water rate under a reclamation project is reasonable or unreasonable, arbitrary and in excess of the statutory authority of petitioners, is strictly a judicial determination, and having shown that an action to make such a determination is not a suit against the United States, we should now point out that since there was no designation in their points on appeal nor any appeal by any respondent in the Court below from the holding of the District Court that any charge to the City of Fresno in excess of the Class I irrigation rate ($3.50 per acre-foot) was unreasonable and illegal, *Jesionowski v. Boston & M. R.R.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416 (1947) nor was any objection raised upon this part of the decision raised by any respondent in their petitions for certiorari under Rule 23(c) of this Court, *Tennessee Coal Co. v. Muscoda*, 321 U. S. 590, 593,

1 L. Ed. 2d 1820, 1825-7, 1957 (1944). It is therefore respectfully submitted that this holding of the District Court that any charge in excess of $3.50 per acre-foot for Class I irrigation water to the City of Fresno was arbitrary, unreasonable and in excess of the statutory authority of respondents must stand.

It is further respectfully submitted that the determinations of whether the City of Fresno and the other cities of this Nation are entitled to the judicial protection of this Court from illegal, arbitrary and prohibitory charges for municipal water in areas *where the Bureau of Reclamation takes over every available source of water in their basin* wide reclamation projects in these times of serious water shortage is one of the most important questions ever to come before this honorable court. We feel that even though the rights of the City of Fresno are small as held by the California Supreme Court they are entitled to the protection of the judicial branch of this government.[24] As stated by the District Court the power to charge excessive and arbitrary rates by petitioners for municipal water carries with it the power to arbitrarily deny water to cities of this Nation and thus destroy them. *Rank v. Krug,* 142 F. Supp. 1, 185 (1956) R. 22.

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[24]"The mere fact, so often emphasized by this District, that Lodi's right is small as compared either with the District's wants or the flow of the stream in no way detracts from that right, which is entitled to both legal and equitable protection."

City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 339, 60 P. 2d 439 (1936).

D. Domestic and Municipal Use of Water Have the Highest Priority in California and Are Entitled to Preference Above Irrigation Use and Petitioners Are Illegally Violating These Laws.

Both the California Supreme Court and the California Legislature have approved the doctrine that domestic use of water takes precedence over every other use and that irrigation use is secondary to this use.[25]

This is also the established policy of the Legislature.[26]

Both the Basic Reclamation Act of June 17, 1902, 32 Stat. 388, 890, and the Central Valley Project Act of July 2, 1956, 70 Stat. 483, 484, require the petitioners to proceed in conformity with State laws.

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[25]"(9) Without question the authorities approve the use of water for domestic purposes as first entitled to preference. That use includes consumption for the sustenance of human beings, for household conveniences, and for the care of livestock."

Prather v. Hoberg, 24 C. 2d 549, 562, 150 P. 2d 405 (1944).

"(9) It should be the first concern of the court in any case pending before it and of the department in the exercise of its powers under the act to recognize and protect the interests of those who have prior and paramount rights to the use of the waters of the stream. *The highest use in accordance with the law is for domestic purposes, and the next highest use is for irrigation.*" (emphasis ours)

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 450, 90 P. 537, 91 P. 2d 105 (1939).

[26]"Sec. 106. *Highest Uses of Water; domestic; irrigation.* It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation." (Enacted 1943.)

California Water Code, Sec. 106.

"Sec. 1460. *Municipal Priority.* The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right irrespective of whether it is first in time." (Enacted 1943.)

California Water Code, Sec. 1460.

As heretofore stated this Court has twice held that the Central Valley Project was to furnish a municipal and domestic water supply to the cities within the service area of the Central Valley Project such as Fresno.

> "32. Prior to December 2, 1935, the defendant, through the Bureau of Reclamation, Department of the Interior, formulated a project for the irrigation of a large area of privately owned land nonriparian to the river, situated both to the north and south of Friant in the counties of Madera, Merced, *Fresno*, Tulare, Kings and Kern in the State of California.' (emphasis ours)
>
> *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, 27, Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

> "The object of the plan is to arrest the flow and regulate the seasonal and year to year variations thereby creating salinity control to avoid the gradual encroachment of ocean water providing an *adequate* supply for *municipal* and irrigation purposes, facilitating navigation and generating power." (emphasis ours)
>
> *Ivanhoe Irrigation Dist. v. McCracken*, 357 U. S. 275, 281, 78 S. Ct. 1174, 1179, 2 L. Ed. 1313 (1958).

> "The Central Valley Basin Development * * * includes water for *municipal* and miscellaneous purposes including *cities*." (emphasis ours)
>
> *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 733, 70 S. Ct. 955, 959, 94 L. Ed. 1231 (1950).

This was also the representation of petitioners to Congress.

"All of these units of the Central Valley Project are to be operated as a coordinated project for irrigation, salinity control, *municipal water supply*, flood control, navigation, power and recreation." (emphasis ours)

Comprehensive Plan for Water Resources Development Central Valley Basin United States Department of the Interior Harold L. Ickes Sceretary Project Planning Report No. 2-4.0-3 November 1945 Page 22.

"Local Municipal Industrial and Miscellaneous Uses. In addition to the irrigation requirements * * * water is needed in the Central Valley Basin for miscellaneous purposes, including *urban areas* * * * industrial areas, household gardens * * *.

"East Side Upper San Joaquin Valley 200,000 ac. ft."

Comprehensive Plan for Water Resources Development Central Valley Basin United States Department of the Interior Harold L. Ickes Secretary Project Planning Report No. 2-4.0-3 November 1945 Page 40.

"The Central Valley Project embodies a plan * * * to provide urgently needed water supplies for *existing* municipal development in the Sacramento and San Joaquin Valley and upper San Francisco Bay Region * * *" (emphasis ours)

Feasibility Report, Secretary of the Interior, dated November 26, 1935, approved by President Roosevelt, December 2, 1935.

In fact even opposing counsel Mr. Veeder, in testimony to Congress claimed that the United States only claimed under California law.[27]

The granting to the City of Fresno of 100,000 acre-feet of Class I irrigation water, the amount petitioners' own witness testified the City needed,[27a] would not take away any water of the districts since in 1953 this same witness testified that there was 800,000 acre-feet of Class I irrigation water available and that 50,000 acre-

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[27]"Mr. Veeder: We claim that the *measure of our rights are the rights to which we succeeded from Rancho Santa Margarita.*

"Mr. Walter: And nothing more; and without regard to the needs of the Marine Corps at Pendleton?

"Mr. Veeder: That is correct sir.

"Mr. Fellows: Do you claim only that the state law applies?

"Mr. Veeder: Yes, sir. The measure of our rights, the *measure of the state law governs entirely our demand upon the Santa Margarita River.* In other words, we certainly cannot claim more than we acquired from the Rancho Santa Margarita.

"Mr. Fellows: And you claim no more?

"Mr. Veeder: That is correct."

Mr. Vanesh again testified before the Senate Judiciary Committee on September 22, 1951.

"Mr. Vanesh: About a year ago the Navy Department came to the Department of Justice and advised us that the water was being taken from the river and that they were being placed on a very dangerous position. They wanted to know what relief could be had.

"Now, we acquired what rights the Rancho Santa Margarita had, no more or less. * * *

"Mr. Vanesh: Mr. Veeder, when he testified before the court when he was handling the case in San Diego, made the statement in open court of record, that the Government would be very glad to stipulate so as to clarify what is meant by 'paramount rights,' and I have so told the State of California.

"*We are claiming under California law.* We have no sleeper in here that is trying to in any way change the water law of the West. This is just a suit on one little river, and that is all we are interested in. * * *"

United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 819-820 (1958).

[27a]Testimony of Leland Hill, Rep. Tr. 15,614 and 15,615.

feet could be made available "without infringing upon the water supply from the project to the various districts that we now have contracts with or contemplate contracts with."[27a]

The testimony of this Bureau of Reclamatoin engineer that there would only be 800,000 acre-feet of Class I irrigation water was based on an estimated seepage and operation loss from the Friant-Kern Canal of 132,900 acre-feet per year. However, actual losses for the 7-year period of 1951 to 1957 averaged only 22,100 acre-feet per year.[27b] This would make available to the City of Fresno 110,800 acre-feet more water than the 50,000 acre-feet which this engineer in 1953 testified he had available for the City, thus making total water available to the City far in excess of the minimum of 100,000 acre-feet which the Bureau's engineer testified the City needed, and far in excess of the 40,000 acre-feet the City needs in addition to its present contract for 60,000 acre-feet per year. This is further borne out by the fact that the petitioning Bureau of Reclamation officials represented to Congress that there would be 200,000 acre-feet of water which they would have available "in addition to irrigation requirements for industrial, household and other miscellaneous requirements in the east side San Joaquin Valley wherein lies Fresno.[27c]

[27b] Annual Reports, Bureau of Reclamation, Region 2.

[27c] "Local Municipal Industrial and Miscellaneous Uses. In addition to the irrigation requirements * * * water is needed in

Here, the only other municipalities or water districts serving strictly domestic or municipal water with contracts for water out of Friant Dam are Orange Cove with a contract for 1,400 acre-feet a year and Fresno County Water Works District No. 18 with a contract for 150 acre-feet a year.

Moreover, *the water level in the districts has risen in practically all districts* except Madera Irrigation District and Chowchilla Irrigation District which have not been using their full quota of water so that the districts may have their lands water logged unless they reduce the amount under their contracts of Central Valley Project water, thus leaving even more water for the City of Fresno if it was necessary. This is the view of the California Water Rights Board. We quote:

> "With the exception of the Madera Irrigation District and Chowchilla Water District which have used only about 66 per cent of their contract allotments, ground water levels have been rising since 1951 more or less steadily in all of the districts receiving water under long-term water delivery contracts with the United States. This rise, coupled with notice of the quantitites of water delivered, average probable future contractual deliveries and acreages irrigated, *presents a strong inference that some readjustment downward of contractual quantitites may ultimately be*

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the Central Valley Basin for miscellaneous purposes, including *urban areas* * * * industrial areas household gardens * * *.
"East Side Upper San Joaquin Valley 200,000 ac. ft."

Comprehensive Plan for Water Resources Development Control Valley Basis, United States Department of the Interior, Harold L. Ickes, Secretary, Project Planning Report No. 2-4.03, November, 1945, Page 40.

not only desirable but necessary to prevent water logging of valuable agricultural lands." (emphasis ours)

State of California, State Water Rights Board, Decision No. D-935, Adopted June 2, 1959.

Although it has been shown that there is sufficient water to give the City of Fresno the 100,000 acre-feet "additional surfact supply" from Friant Dam which the Bureau of Reclamation, engineer Hill testified was the minimum requirement of the City of Fresno without taking any needed water from the districts, nevertheless we point out Section 9(c) of the Act of 1939 (53 Stat. 1187, 1194) in passing. We submit this section of the Act is unconstitutional.

This section 9(c) reads as follows:

"No contract relating to municipal water supply * * * shall be made unless in the judgment of the Secretary it will not impair the efficiency of the project for irrigation purposes."

To say farmers are entitled to water but that mechanics, labor union members, the teachers, the professional men, the women and the children of California cities are not at least equally entitled to such water where there is no other possible source of supply to such cities as Fresno is such rank and arbitrary discrimination as to clearly violate the Fifth Amendment to the Constitution of the United States, especially where as has been shown, petitioners' Central Valley Project will take over every sources of supply

to the City. (Sen. Document 113, 81st Congress, Second Session).

It is submitted that the above section of the Act of 1939 violates the Fifth Amendment and constitutes unreasonable and arbitrary class legislation.

> "• • • discriminatory legislation may be so arbitrary, injurious or unjustifiable as to be violating of the due process clause in the Fifth Amendment."
>
> 16A C. J. S. 587.
>
> *Bolling v. Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

The fact, however, that the petitioning Bureau of Reclamation officials had filed applications to use these waters thereby acknowledging *they did not own them*, nor were they claiming to own them, and that by reason thereof they *cannot claim* title to such waters as having been acquired by eminent domain. Filing and processing an application to appropriate and use such waters is entirely inconsistent with petitioners' claim that the United States was the owner of said waters by reason of having seized them by eminent domain as erroneously claimed by petitioners. However, the acts of taking, storing and using said waters prior to a ruling by the State Water Rights Board on their application was an illegal use of said waters and beyond the statutory authority of petitioners.

E. The Petitioners, Bureau of Reclamation Officials, Are Acting Illegally and in Excess of the Authority Conferred Upon Them by Congress by Violating the California County of Origin and Watershed of Origin Laws Which Congress Specifically Required Petitioners to Obey. This Action Is Therefore Not Barred by the Doctrine of Sovereign Immunity.

At page 29 of petitioners' brief appears the following:

> "However, as we now show, not only was the conduct complained of clearly within constitutional bounds, but it was fully authorized by Congress. It thus falls within neither of the exceptions to the doctrine of sovereign immunity developed by the decisions of this Court and most recently articulated in *Malone v. Bowdoin*, 369 U. S. 643, 647:
>
> "[T]he action of a federal officer affecting property claimed by a plaintiff can be made the basis of a suit for specific relief against the officer as an individual only if the officer's action is 'not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.' * * *"

The District Court held that the City of Fresno, under the California County of Origin and Watershed of Origin laws was entitled to water to fulfill its municipal and domestic requirements before any water was taken by petitioners out of either the watershed or the County of Fresno—one of the counties in which the

San Joaquin River originates[28] and in which county of origin and watershed of origin the City of Fresno is also located (*Rank v. (Krug) United States,* 142 F. Supp. 1 (1956)). R. 22.

The District Court further ruled that these priority rights of the City of Fresno were enforceable by injunction against the petitioning Bureau of Reclamation officials and that if interferred with by the petitioning Bureau of Reclamation officials the City of Fresno was not limited to a claim for damages in the United States Court of Claims. (*Rank v. (Krug) United States,* 142 F. Supp. 1 (1956)). R. 22.

The District Court also ruled that Petitioners were bound by California's County of Origin and Watershed of Origin to supply the riparian and percolating water users between Friant and Gravelly Ford Canal and that Congress had not authorized petitioners to take water necessary to supply these rights.[29]

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[28] "* * *. The San Joaquin River is a natural watercourse arising in the Sierra-Nevada in Fresno and Madera Counties."

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 90 P. 2d 537, 91 P. 2d 105 (1939).

[29] "* * *. The conclusion *may be* justified that the report indicated an intention to take all the water below Mendota and replace it with other water. *This court can see no justification for the conclusion* that Congress, in making appropriations on the basis of the feasibility report indicated an intention to take the water rights of the plaintiffs' lands above Mendota." (emphasis ours)

Rank v. Krug, 90 F. Supp. 773, 792 (1950).

"Turning, then, to the text of the Acts of Congress dealing with Central Valley, there cannot be found therein any language which requires or suggests any intention by any Act of Congress to take the water rights of these plaintiffs and their class without compensation, *or to take them at all, for that matter.* * * *." (emphasis ours)

Rank v. Krug, 90 F. Supp. 773, 791 (1950).

The Court below held that these rights had not been taken by eminent domain but erroneously held Petitioners could take them by eminent domain.

While agreeing with the court below that Petitioners have not taken these County and Watershed of Origin rights of respondents by eminent domain we submit the court below erred in holding that they could be so taken.

1. The Rights of the Petitioning Bureau of Reclamation Officials to Take the Water Rights of the City of Fresno and the Other Plaintiffs by Eminent Domain Under the Central Valley Project Are Limited by the Power Expressly Given Them by Congress.

The power of United States Administrative Agencies is limited by the powers expressly given them by Congress.

> "Where Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted." (Syllabus)
>
> *Stark v. Wickard, Secretary of Agriculture,* 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733. (Syllabus)

(a) The Power of Eminent Domain Is Vested Solely in Congress.

The power of eminent domain is vested solely in Congress.[30]

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[30]"The power of eminen domain is vested solely in Congress and the executive has no inherent power in nature of eminent domain." (Syllabus)

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary

2. Congress Never at Any Time Granted the Petitioning Bureau of Reclamation Officials the Power to Take Water Needed in California County or Watershed of Origin by Either Condemnation or Eminent Domain, but Expressly Withheld This Power.

It having been shown that only Congress had the power to grant to the Bureau of Reclamation officials the right to take property for Central Valley Project operations by either eminent domain or condemnation proceedings, it will now be shown that Congress specifically withheld from the Bureau of Reclamation officials the right to take water needed by the county of origin and watershed of origin under the Central Valley Project.

3. The Acts of Congress Make the Petitioning Bureau of Reclamation Officials Subject to California's County of Origin and Watershed Acts.

The first enactment of Congress governing the operation of the United States Bureau of Reclamation provided that all reclamation projects must be operated in accordance with state law.

"Sec. 8. That nothing in this act shall be construed as affecting or intending to affect or in any way interfere with the laws of any state or

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implication to do so by some Act of Congress, is no act of Government." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"* * *. Contrary to contention that President had 'inherent' power to be exercised in public interest, the president's power to issue Executive Order directing Secretary of Commerce to take possession of plants of steel companies involved in labor dispute would have to stem either from an act of Congress or from the Constitution itself." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

territory relating to the control, appropriation, use or destruction of water used in irrigation or any vested right acquired thereunder and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws."

Act of June 17, 1902 (32 Stats. at L. 388, Chapter 1093) 43 U.S.C. 391.

This court has held that the Act of June 17, 1902, requires respondent officials building reclamation projects to proceed in conformity with California laws.

"The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently, through the 42 years since the 1902 Act, been zealous in maintaining compliance with Section 8 of the 1902 Act. They are proud of the historic fact the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws."

United States v. Gerlach Live Stock Co., 339 U. S. 725, 740, 70 S. Ct. 955, 963, Footnotes 14 and 15.

Congress again in 1956 in legislation *concerning the Central Valley Project* readopted the same provisions of the basic reclamation law of 1902.[31]

MOREOVER, CONGRESS SPECIFICALLY BY STATUTE REQUIRED THE PETITIONING BUREAU OF RECLAMATION OFFICIALS TO FOLLOW CALIFORNIA'S COUNTY OF ORIGIN AND WATERSHED OF ORIGIN ACTS, both of which expressly prohibit the Petitioning Bureau of Reclamation officials from taking water needed by either the county of origin or watershed of origin by condemnation or eminent domain proceedings.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, * * *.
>
> "* * * the Secretary of the Interior shall make recomendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO THE COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of Oct. 14, 1949, 63 Stats. 852, 853 (1949).

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[31] "Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall *proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government* or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided:* That the right to the use of water acquired under the provisions of this Act *shall be appurtenant to the land irrigated* and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto). (emphasis ours)

Act of July 2, 1956, 70 Stat. 483 at 484.

Comparison with other Congressional Acts involving water rights on California Streams should also be resorted to. We quote from the DeLuz Bill:

> " 'In the interests of comity between the United States and the State of California, and consistent with the historic policy of the United States of America of federal non interference with state water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriate water rights required under the laws of the State of California. * * *' ".
>
> *United States v. Fallbrook Public Utility District*, 165 F. Supp. 806, 845, (1958).

4. Administrative Interpretation.

Administrative interpretation of a statute is also important. The Bureau of Reclamation has interpreted the congressional acts involving the Central Valley Project as requiring them to leave sufficient water in the county of origin and watershed of origin to satisfy all of the present and ultimate needs of these two areas and only to take *surplus* waters for exportation out of the county of origin and watershed of origin.

> "66. In addition to respecting all existing water rights, *the Bureau* in this report has complied with *California's county of origin legislation*, which requires that water shall be reserved *for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.*" (emphasis ours)
>
> Senate Document 113, 81st Congress, page 65
> Plaintiff's Exhibit 136, P. 2285.

It will be noted that petitioning Bureau officials said "water" would be reserved for the county and watersheds of origin—not damages.

The above is a clear admission that the Bureau itself has and now administratively interprets the Basic Reclamation Act of 1902 to the effect it is bound by California's *County of Origin and Watershed of Origin* Legislation to leave enough water (not money) to meet the needs of the County of Origin and Watershed of Origin and to only take *surplus waters* for their reclamation projects from these areas of origin as shown by the last two lines above quoted from Senate Document 113, 81st Congress [R. 2285] which we again quote:

> "* * * only surplus *waters* will be exported elsewhere. * * *." (emphasis ours)
>
> Senate Document 113, 81st Congress, 1st Session, Plaintiffs' Exhibit 136, R. 2285.

5. Congressional Committee Reports.

That the Bureau of Reclamation is prohibited from acquiring water needed by the county of origin and watershed of origin also appears from the latest committee report of Congress dealing with the Central Valley Project, which of course, is a well-recognized aid upon which the courts may rely in interpreting a statute.

> "The opinions of the State Attorney General mentioned above declare that both the State and Federal Government in the operation of the CVP are subject to the *restrictions* of the County Origin Law and the Watershed Protection Act." (emphasis ours)

Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246 at page 516 (1956).

"The 1929 session of the Legislature had before it a report of a joint committee of the Senate and Assembly dealing with the water problems of the State. With regard to the protection of the interests of the counties of origin, this report stated:

"In supplying areas of deficiency of water from areas of surplus only such water as is not needed to serve vested or other property rights, or necessary for supplying the uses and purposes hereinbefore mentioned should be considered, and no water should be diverted from the area of origin which is now or which may ever be required for any beneficial use within such area of origin." (emphasis ours)

Central Valley Project Documents, 85th Congress, 1st Session, House Document No. 246 at page 521 (1956).

Having shown that Congress intended that the petitioning Bureau of Reclamation officials' right to take water by either eminent domain or condemnation proceedings was to be limited by the provisions of the California County of Origin and Watershed of Origin Acts, a specific look at these acts, together with the interpretation placed thereon by the petitioners, California Legislature in adopting these acts by the Attorney General of the state of California, and the California administrative agencies applying them, also clearly indicates that the Bureau of Reclamation may not condemn

or take by eminent domain ~~water needed~~ by the county of origin and watershed of origin. We quote petitioners.

> "*There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool,* water needed for preservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)
>
> R. 2284, Pltf. Ex. 121, Testimony of U. S. B. R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate, 80th Congress, 1st Session on S-912, p. 708, Rep. Tr. 3072.

"66. In addition to respecting all existing water rights, the Bureau in this report has complied with California's county-of-origin legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere. Next in imporance after the areas having water rights and the counties of origin are the areas now under irrigation systems but needing supplemental water. The water requirements of such areas have also been given priority over the needs of new areas."

R. 2285, Pltf. Ex. 136, Central Valley Basin, a Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin, and Com-

ments from the State of California and Federal Agencies, Senate Document 113, 81st Congress, 1st Session, August, 1949, Rep. Tr. 6570.

6. The California Constitution and Statutes Are Clear and Definite That No Water Needed by Either the Watershed of Origin or County of Origin May Be Diverted by the Petitioning Bureau of Reclamation Officials Out of Said County of Origin or Watershed of Origin.

Until a few years before the Central Valley Project Act, a riparian owner was entitled to have all of the waters of a stream flow past his riparian land. In order to make the Central Valley Project possible so that the Government could take surplus waters from the rivers involved in the Central Valley Project, it was necessary to amend the State Constitution of the State of California which was done November 26, 1928.

> "The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably for the beneficial use to be served, * * * provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."
>
> West's Annotated California Codes, Constitution, Article XIV, para. 3, page 265.

California Legislative Enactments also require that only surplus waters may be exported from the county and watershed of origin.[32]

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[32]*Prior Right to Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein."

Water Code, Sec. 11460.

"*Exchange of Watershed Water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were in the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange." (emphasis ours)

Water Code, Sec. 11463.

"*Limitations. The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof,* including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object countemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Sec. 1.)" (emphasis ours)

Water Code, Sec. 11128.

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)"

Water Code, Sec. 10505.

7. Reservation of Water for the Areas in Which It Originates Is the Fundamental Law of California Irrespective of Statute According to the Decisions of the California Supreme Court.

Irrespective of the acts of the California Legislature it is the basic and fundamental law of California as shown by the decisions of the California Supreme Court that areas in which water originates shall be protected from exportation out of the area in which water originate.

Miller v. Bay Cities Water Co., 157 Cal. 256, 270, 107 Pac. 115, 27 L. R. A., N. S. 772 (1910);

Burr v. Maclay Rancho Water Co., 154 C. 428, 436, 98 P. 260 (1908).

"* * * the doctrine of protection of the watershed of origin has been consistently applied by the California Courts in the protection of riparian and overlying rights in recognition of the facts that the natural advantages of a surface or underground water supply was the principal reason for the settlement and development of the counties and watersheds where water originates. *Bathgate v. Irvine*, 1899, 126 Cal. 135, 143, 58 P. 422; *Peabody v. City of Vallejo*, 1935, 2 Cal. 2d 351, 370, 371, 40 P. 2d 486."

Rank v. (Krug) United States, 142 F. Supp. 1 at 150.

8. The Views of Other California Agencies on the Rights of the City of Fresno and Other Landowners in the County of Origin and Watershed of the San Joaquin River.

Although we do not agree with all of the State Water Rights Board of the State of California's decision,[33] June 2, 1959, the Board correctly ruled that the petitioning Bureau of Reclamation officials were bound to furnish water to the City of Fresno and other landowners.

In the above decision the United States and all parties in this action were present and although there is a judicial review by California Courts provided for this decision, none of the parties asked for a judicial review, except respondent which later dismissed its petition.

"'Under this plan, the basins favored with water in excess of their needs would be furnished

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[33] "* * * as a matter of both state and federal law, it appears that the United States, the Bureau of Reclamation as well as its parent organization, the Department of the Interior and the Secretary thereof, are obligated to observe Water Code Sections 11460-11463, in carrying out the Central Valley Project. * * *."
State Water Rights Board of the State of California Decision No. D-935, Adopted June 2, 1959, p. 100.

"* * * Whatever may have been the intent of the Legislature in adopting these statutes we cannot conclude that it was intended thereby to deprive areas such as the City of Fresno and the Fresno Irrigation District of a source of water supply so readily accessible to them as that obtainable from the San Joaquin River. * * * we believe that *the Legislature in adopting 'Watershed Protection' Sections 11460-11463 and 'County of Origin' Sections 10500, 10501 and 10505, was expressing a policy that areas such as the City and the District, both highly developed and well established, located almost at the very outlet-works of Friant Dam should not incur deficiencies in supply such as they are now suffering while water is transported past them to distant undeveloped lands.*" (emphasis ours)
State Water Rights Board of the State of California, Decision No. D-935, Adopted June 2, 1959, Page 72.

a regulated supply in accordance with the requirements of their ultimate development. Waters in excess of their needs would be conveyed to areas of deficiency * * *.'"

Report to the Legislature of 1931 on State Water Plan, Bulletin No. 25, page 35.

9. Opinions of the California Attorney General.

The Attorney General of the State of California both in his opinions to the State Legislature and in his stand before the trial court took the position that the defendant Bureau of Reclamation officials were powerless to take either by proceedings in condemnation or by seizure under eminent domain under the Central Valley Project the rights of the California landowners given them by the county of origin and watershed of origin protective acts.

"The legislative background of the priority makes it difficult to conceive that the Legislature intended that the authority could destroy the priority by condemnation. Since the priority exists only as against the authority, such a construction would completely destroy the effect of Section 11460 and make its enactment an idle gesture."

25 Opinions, Attorney General p. 21, (1955)

The Attorney General of California has clearly ruled that the rights of the county and watershed of origin are not subject to condemnation nor taking by eminent domain. The above opinion was given by California Attorney General "Pat" Brown, dated January 5, 1955.

in answer to the following two questions referred to him as California Attorney General:

"(2) Under these code sections, would water appropriated for use in areas outside the county where the water originates, or the watershed where the water originates and areas immediately adjacent thereto, be made available later for use in such local areas, if the water became necessary for their development at some time in the future?

"(3) Are Water Code sections 11460 and 11463 applicable to the United States in the construction and operation of the Central Valley Project?"

25 Opinions, Attorney General p. 9, (1955).

to which above questions California's Attorney General gave the answers:

"(2) In the circumstances specified in the statute, Water Code Sections 10505 and 11460 would require that *water* which had been put to use in the operation of the Central Valley Project in areas outside the county of origin, or the watershed of origin and areas immediately adjacent thereto, be withdrawn from such outside areas and made available for use in the specified area of origin.

"(3) Water Code Sections 11460 and 11463 are applicable to the United States in its operation of the Central Valley Project * * *."

25 Opinions, Attorney General p. 9, (1955).

"VI. Reversion of Water to Areas of Preference When Needed.

"From what has already been said, it follows that the interim use of water reserved for counties

of origin under section 10505, or for watersheds of origin under section 11460 and 11463 is subject to termination whenever such water becomes necessary for development of such areas of preference and proper applications to appropriate the water for use therein are filed and granted. In such case *there would be no right of reimbursement for the project works* which had been used for the interim use of the water exported." (emphasis ours)

25 Opinions, Attorney General p. 27, (1955).

If *waters* originating in the county and watershed of origin heretofore taken and used by the United States in the Central Valley Project may be withdrawn to the county and watershed of origin without even paying for portions of the project rendered useless thereby, how can opposing counsel conceivably argue that the government has the right to take these waters by either condemnation proceedings or eminent domain.

10. Petitioners' Citations Distinguished.

Having shown that the actions of petitioners were illegal in not reserving water to the City of Fresno and the riparian and overlying owners between Friant and Gravelly Ford Canal, all of whom are in the county and watershed of origin of the San Joaquin River, this case falls within the well-recognized exception to the doctrine of sovereign immunity that even cases relied upon by petitioners recognize. We quote from petitioners' own cases:

"Action of a federal officer affecting property claimed by a plaintiff can be made basis of a suit for specific relief against the officer as an in-

dividual only if the officer's action is not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case are constitutionally void."

Malone v. Bowdoin, 369 U. S. 643, 82 S. Ct. 980, 8 L. Ed. 2d 168 (1962) (Syllabus).

"* * * Nor has it been asserted that the petitioner was exceeding his delegated powers as an officer of the United States * * *."

Malone v. Bowdoin, 369 U. S. 643, 82 S. Ct. 980, 984, 8 L. Ed. 2d 168 (1962).

The same distinction appears in *State of New Mexico v. Backer*, 199 F. 2d 426 (1952).

"* * * There are no allegations in the complaint or any evidence that Backer was acting unconstitutionally or pursuant to any unconstitutional grant of power, nor is there any allegation or claim that Backer was acting beyond his delegated power when he permitted water to be drained from the reservoir. Normally his powers required him to release water through the dam to meet the contracted and treaty obligations of the United States."

State of New Mexico v. Backer, 199 F. 2d 426, 428 (1952).

In *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F. 2d 425 (1954), there was no allegation, as here, that the actions of the officer conflicted with his valid statutory power.

The same distinction appears in *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 69

S. Ct. 1457, 93 L. Ed. 1628 (1949), cited by petitioners. We quote:

> "* * *, where the officer's powers *are limited by statute*, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the lack of delegated power. * * *.
>
> "A second type of case is that in which the * * * order conferring power upon the officer * * * is claimed to be unconstitutional" (emphasis ours)
>
> *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 689, 69 S. Ct. 1457, 1461, 93 L. Ed. 1628 (1949).

F. Congress Did Not Authorize the Taking of Respondent's Riparian and Percolating Water Rights Between Friant Dam and Gravelly Ford Canal.

1. The Decision of the Courts.

The decision of the Court of Claims which has been acquiesced in by all parties clearly show that the petitioners, Bureau of Reclamation officials, were not authorized by Congress to take the riparian rights of the respondents between Friant Dam and Gravelly Ford Canal.

> "*Defendant's plan, as modified contemplated among other things*, that the United States should

eventually store and divert to non-riparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, *except for releases from Friant Dam which would be for one or more of three purposes:* (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *." (emphasis ours)

Wolfsen v. United States, 62 F. Supp. 403, 411 (1958).

"* * * The conclusion may be justified that the report indicated an intention to take all the water below Mendota and replace it with other water. *This court can see no justification for the conclusion* that Congress, in making appropriations on the basis of the feasibility report indicated an intention to take the water rights of the plaintiffs' lands above Mendota.

Rank v. Krug, 90 F. Supp. 773, 792 (1950).[34]

"Turning, then, to the text of the Acts of Congress dealing with Central Valley, there cannot be found therein any language which requires or suggests any intention by any Act of Congress to take the water rights of these plaintiffs and their class without compensation, *or to take them at all, for that matter.* * * *." (emphasis ours)

Rank v. Krug, 90 F. Supp. 773, 791 (1950).[34]

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[34]Cited with approval by this Court in *Gerlach Live Stock Co. v. United States*, 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

2. Acts of Congress.

Congress itself by virtue of the Act of October 14, 1949, 63 Stat. 852, 853, required petitioners to reserve water for lands of respondents lying in the county and watershed of origin of the San Joaquin River.

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby *reauthorized* * * *.
>
> "Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)
>
> Act of October 14, 1949, 63 Stat. 852, 853.

3. The Administrative Interpretation.

a. Bureau of Reclamation Reports to Congress.

The continued reports of the Bureau of Reclamation to Congress clearly indicate that the Bureau officials were not authorized and neither would they consider they were authorized to take the riparian or percolat-

ing water rights between Friant Dam and Gravelly Ford Canal.

"Senator Downey: What unit is this? Is this Millerton Reservoir?

"Mr. Stoner: This is just Millerton now. Finally in order to determine from the above a definite figure for the project irrigation supply in the southern San Joaquin Valley, consideration must be given to the water commitments downstream on the San Joaquin River, and to evaporation and seepage losses.

"There are certain existing rights *downstream from Friant which have to be supplied.* Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for perservation of fish life and waterfowl, and losses from evaporation and seepage in the reservoirs and canals, it has been determined *that* 150,000 *acre-feet of Class I water must be reserved to meet those requirements.*" (emphasis ours)

R. 2284 Pltf. Ex. 121, Testimony of U. S. B. R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States Senate, 80th Congress, 1st Session on S-912, p. 708, Rep. Tr. 3072.

"66. In addition to respecting all existing water rights, the Bureau in this report has complied with California's county-of-origin legislation, which *requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere.* Next in im-

portance after the areas having water rights and the counties of origin are the areas now under irrigation systems but needing supplemental water. The water requirements of such areas have also been given priority over the needs of new areas." (emphasis ours)

R. 2285, Pltf. Ex. 136, Central Valley Basin, a Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin, and Comments from the State of California and Federal Agencies, Senate Document 113, 81st Congress, 1st Session, August, 1949, Rep. Tr. 6570.

4. Petitioners in Their Pleadings Themselves Admit That Under the Central Valley Project Respondents Between Friant and Gravelly Ford Were to Retain Their Riparian and Percolating Water Rights.

WHAT IS MORE IMPORTANT, THE PETITIONING BUREAU OF RECLAMATION OFFICIALS, WHOSE ATTORNEYS BEFORE THIS COURT ARE NOW CLAIMING THEY HAVE TAKEN THE RIGHTS OF THE RIPARIAN AND OVERLYING PERCOLATING WATER OWNERS BETWEEN FRIANT AND GRAVELLY FORD CANAL TO WATER OF THE SAN JOAQUIN RIVER BY EMINENT DOMAIN, IN THEIR ANSWER ADMITTED "THE PLAN OF THE CENTRAL VALLEY PROJECT APPROVED BY CONGRESS" REQUIRED PETITIONERS TO RELEASE INTO THE SAN JOAQUIN RIVER A SUFFICIENT QUANTITY OF WATER TO SATISFY THOSE RIPARIAN AND OVERLYING RIGHTS TO WHICH RESPONDENTS WERE ENTITLED UNDER THE LAWS OF CALIFORNIA.

"* * * allege *the plan of the Central Valley Project, approved by the Congress* * * *, as it

affects the San Joaquin River between Friant Dam, constructed, owned and operated by the United States, and Gravelly Ford, a point approximately thirty-seven miles westerly thereof, *requires the Bureau of Reclamation to, and it will, recognize and respect existing water rights of all riparian owners, including such of the plaintiffs, if any, as are riparian owners on the San Joaquin River between Friant Dam and Gravelly Ford, as they exist under the laws of the State of California* and which have not heretofore been acquired or adjusted by the United States. In order to accomplish this purpose, that is to say, to give that recognition to those rights which the laws of California require, *it is the plan, purpose and intention of the Bureau of Reclamation to release at Friant Dam into the bed of the river a sufficient quantity of water so as to enable said riparian owners between Friant Dam and Gravelly Ford to divert from the stream and to make reasonable beneficial use, by using reasonable methods of diversion and reasonable methods of use and purpose, the waters required for irrigation and domestic use*, and in addition thereto to maintain a live stream in the river of not less than five second feet at Gravelly Ford." (emphasis ours)

R. 140, 141. Answer of petitioners to Complaint.

"3. That *this Honorable Court determine* which lands described in plaintiffs' complaint on file herein *have their underground water strata charged and recharged from the San Joaquin River.*

"* * *

"5. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, *which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River* if Friant dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River *and to supply the underground percolating waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters.*" (emphasis ours)

R. 146, 147, Answer of petitioners to Complaint.

The cost of any changes to provide percolating water from the San Joaquin River to the overlying landowners owning percolating rights on the alluvial cone on the San Joaquin River fed by the waters percolating from the San Joaquin River by petitioners' own admission were to be borne by the Bureau of Reclamation.[35]

Since the action of petitioners in attempting to illegally take the percolating and riparian water rights of respondents between Friant and Gravelly Ford, it is submitted that on this ground also the illegal actions of

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[35]"These defendants are informed and believe, and so believing allege, that the costs, if any necessarily incurred by those diverting from the underground water table supplied or fed by the San Joaquin River, in adapting or adjusting their facilities to meet the change, if any, in said underground water supply caused or resulting from the reduced and controlled flow of the San Joaquin River, *will likewise be borne by the Bureau of Reclamation,* * * *." (emphasis ours)

R. 141, Answer of petitioners to Complaint.

petitioners fall within the exception of the doctrine of sovereign immunity recognized even by petitioners at page 29 of petitioners' brief and by the cases of *Malone v. Bowdoin, supra, Larson v. Domestic & Foreign Corporation and Land v. Dollar supra*, and other cases, relied on by petitioners.

G. Since the Acts of Petitioners in Attempting to Take the Riparian and Percolating Water Rights of Respondents Were Illegal and in Excess of the Authority Conferred Upon Petitioners by Congress There Was No Taking of Respondents Rights by Eminent Domain.

At page 32 of petitioners' brief appears the following:

> "* * * the United States is expressly authorized by statute to acquire, by the exercise of its power of eminent domain, such water rights as are felt to be necessary to accomplish the purposes of the Central Valley Project * * *."

It has been shown however that the acts of petitioners in taking water needed in Fresno County and located in the watershed and county of origin of the San Joaquin River[36] away from said county without reserving necessary water for the said county or the land owners and cities in the county and watershed of origin of the San Joaquin, like Fresno, as required by the Basic Reclamation Act of 1902 and the Act of

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[36] "* * *. The San Joaquin River is a natural water course arising in the Sierra-Nevada in Fresno and Madera Counties * * *."

Meridian, Ltd. v. San Francisco, 13 C. 2d 424, 90 P. 2d 537, 91 P. 2d 105 (1939).

October 14, 1949, 63 Stat. 852, 853, and in originally attempting to take possession and store surplus and other waters of the San Joaquin without a license to do so by the California Water Rights Board, in ignoring the domestic and municipal water priorities of California cities, in charging illegal and arbitrary and excessive rates for water out of the Central Valley Project, in arbitrarily refusing to sell water to respondent City of Fresno which admittedly lies in the service area of the Central Valley Project and other illegal acts it will now be shown by the following brief citation of authorities that an act of a United States administrative official beyond the limits of his statutory authority is not the act of the Sovereign *and does not constitute a taking by eminent domain.* Therefore the claim of opposing counsel that respondents' water rights have been taken by eminent domain is without merit.

"The taking of private property for public use by an officer of the United States, unless authorized, expressly or by necessary implication to do so by some Act of Congress, is no act of Government." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"Seizure by Secretary of Commerce of plants of steel companies involved in labor dispute being unauthorized by law there could be no recovery by suit in Court of Claims for damages under implied contract and there could likewise be no re-

covery under Federal Tort Claims Act, 28 U S. C. A. Sec. 1346b." (Syllabus)

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"* * * the Supreme Court has held on many occasions that officers of the Executive Branch of the Government may be enjoined when their conduct is unauthorized by statute, exceeds the scope of constitutional authority, or is pursuant to unconstitutional enactment. Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628; Land v. Dollar, 330 U. S. 731, 67 S. Ct., 1009, 91 L. Ed. 1209; Philadelphia v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L Ed. 570; United States v. Lee, 106 U. S. 196, 1 S. Ct., 240, 27 L. Ed. 171. There is no doubt therefore, that the defendant is subject to an injunction, and the President not only is not a party but he is not an indispensable party to this action, as held in Williams v. Fanning, 332 U. S. 490, 68 S. Ct. 188, 92 L. Ed. 95; Hynes v. Grimes Packing Co., 337 U. S. 86, 69 S. Ct. 968, 93 L. Ed. 231."

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, Affd. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952)

The lands between Friant and Gravelly Ford are all within the county of origin and watershed of the San Joaquin River and as has already been shown in the preceding subchapter "E" of this chapter that respondents' rights to water were not to be taken. We will

not then go into the question of the reservation of water for counties and watersheds of origin again.

We have also shown, *supra*, that the petitioners themselves by their answers admitted they were not taking these rights and that they prayed the Court to determine which lands between Friant and Gravelly Ford Canal had percolating and riparian rights and asked the District Court to determine how much water they were entitled to—thereby clearly negativing any claim these rights had been taken by eminent domain [R. 140, 141].

As heretofore shown Congress itself by the Act of October 14, 1949, 63 Stat. 852, 853, expressly prohibited petitioners from taking water out of the county and watershed of origin.

The application to appropriate surplus water filed by the petitioners with the California Water Rights Board which could give them over 300,000 acre-feet of surplus waters which formerly flowed down the river past the lands of respondents *without cost*, and the acceptance of permit *to take this water subject to the vested rights of respondents:*

> "Vested rights were unaffected. All permits and licenses issued by the statutory agency (now the State Water Board) are declared therein to be 'subject to vested rights.' (Cal. State Water Board, 'Rules, Regulations and Information pertaining to Appropriation of Water in California' (1956); see, Meridian, Ltd. v. City and County of San Francisco, 13 Cal. 2d 424, 450, 90 P. 2d 537, 91 P. 2d 105; Rank v. Krug, D.C., 142 F. Supp. 1)."
>
> *United States v. Fallbrook Public Utility District*, 165 F. Supp. 806, 831 (1958).

is entirely inconsistent with any theory of opposing counsel that these rights had been seized by eminent domain with resultant huge liability to the Government in taking these rights.

Finally, it clearly appears from statements of the Attorney General and State Engineer of the State of California and the statement of the Secretary of the Interior himself that there had been no taking nor any intention to take any of respondents' rights by eminent domain.

U. S. Webb, Attorney General for the state of California, and Mr. Young, Chief of the Bureau of Reclamation, as early as 1937, publicly stated that no water rights of Appellees in the stretch of the river between Friant Dam and Gravelly Ford would be taken away but that they would have more water than ever before under the Central Valley Project.[37]

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[37]"By Mr. Rowe: Q. Prior to the construction of Friant Dam, did you attend any meetings with some of the irrigation districts in the south part of the valley, and State officials and Bureau of Reclamation officials?

"A. Yes, a good many meetings. • • •

"The Witness (J. E. Cobb): Well, at Sacramento we met with Mr. Young, Hyatt was for the State, Van Etten and Edmundson, Mr. Kelly was the Department of Public Works, I believe, and Webb was the Attorney General at the time, U. S. Webb, I believe it was.

"• • •

"Q. Well, what did Mr. Young and Mr. Kelly tell you?

"• • •

"The Witness (J. E. Cobb): We were told we would have a large flow of well-regulated water; that the Government wouldn't take something away from one farmer and give it to another; and they told us always they were taking nothing but the overflow flood water, and we had the best water rights in the country, and they would protect them."

Witness Plaintiff J. E. Cobb, Rank v. Krug, Rep. Tr., pp. 6630 to 6632, June 18, 1952.

"Kelly and Webb declared they are positive no such situation will arise; that the Central Valley Project will be completed as a

This letter written long after appellants claimed date of taking in 1941 and long after this action was filed, plainly shows that the Secretary of the Interior did not on that date regard the rights of Appellees to have been taken by eminent domain and did not regard the *Gerlach* case as so holding.

Finally, the letter of Secretary of the Interior, Douglas McKay, dated March 30, 1953, again reaffirms the Bureau's intention to pass sufficient water out of Friant Dam down to Gravelly Ford to "satisfy the natural depletions and *all valid rights under California law*"[38] and that the Appellants clearly admit that the amount of water necessary to "satisfy the natural depletions and *all valid rights under California law*" to the use of water originating above Gravelly Ford Canal is for judicial determination, as shown in the answer filed by petitioning Bureau officials *requesting the trial court to judicially determine the amount of water that riparian users between Friant Dam and Gravelly Ford*

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whole; that no present owner of water rights in the San Joaquin will be deprived of any water and that the California Water Authority will guard zealously the rights of all property owners."

Excerpt from Pltf. Ex. 161, Article in Fresno Bee dated February 5, 1937.

[38]Excerpt from Def. Ex. A-79-A:

"United States Department of the Interior, Office of the Secretary, Washington 25, D. C.
March 30, 1953

"My dear Mr. Attorney General:

"* * * the Department will release from Friant Reservoir into the bed of the river a sufficient quantity of water (1) to meet all valid legal requirements for the reasonable and beneficial use of water, both surface and underground, by reasonable methods of diversion and reasonable methods of use in that area, and (2) * * *

"Sincerely yours,
/s/ Douglas McKay,
Secretary of the Interior."

and the overlying landowners in the alluvial cone of the San Joaquin River were entitled to.

"1. That this honorable court determine which lands described in plaintiffs' complaint are riparian to the San Joaquin River and are entitled to a reasonable quantity of water for irrigation and domestic use therefrom.

"2. That this honorable court determine which lands described in plaintiffs' complaint on file herein have their underground water strata charged and recharged from the San Joaquin River."

Respondents may therefore exercise their rights to an injunction as they have here. Moreover, since the Bureau of Reclamation applied to the California State Water Rights Board for a permit to take the surplus waters of the San Joaquin River and were granted and accepted such permit (California State Water Rights Board Decision No. D-935) clearly petitioners were not claiming this water as a matter of right so there could not possibly have been a taking by eminent domain.

1. Cases Cited by Petitioners Distinguished.

The following quotation relied upon by petitioners from *Decatur v. Paulding*, 39 U. S. 497, 14 Pet. 495, 516, 10 L. Ed. 559 (1835):

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

is fully answered by the following later decisions cited with approval by this Court.

"The doctrine of the separation of powers was adopted by the convention not to promote efficiency but to preclude the exercise of *arbitrary power.*" (emphasis ours)

Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569, Aff. 343 U. S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

"In our view, this case resolves itself into a question of the power of the Secretary of the Interior * * *. But as has been affirmed by this court in former decisions *there is no place in our constitutional system for the exercise of arbitrary power,* and, if the Secretary has exceeded the authority conferred upon him by law then there is power in the court to resolve the status of the parties aggrieved by such unwarranted action." (emphasis ours)

Garfield v. United States, ex. rel. Goldsby, 211 U. S. 249, 262, 29 S. Ct. 62, 66, 53 L. Ed. 168, 174 (1908).

"Arbitrary power and the rule of the constitution cannot both exist."

Jones v. Securities and Exchange Commission, 298 U. S. 1, 24, 56 S. Ct. 654, 661, 80 L. Ed. 1015 (1936).

"The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President * * *. The Founders of this Nation

entrusted the law making power to the Congress along in both good and bad times. * * * this seizure cannot stand."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 588, 72 S. Ct. 863, 867, 96 L. Ed. 1153 (1952).

"The essence of our free Government is 'leave to live by no man's leave, underneath the law' to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible."

Youngtown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 569. Aff. 343 U. S. 579, 588, 72 S. Ct. 863, 880, 96 L. Ed. 1153 (1952).

Moreover, we call the Court's attention to the remaining language in *Decatur v. Paulding*, 39 U. S. 497, 14 Pet. 495, 497; 10 L. Ed. 559 (1835):

"If a suit should come before the Supreme Court which involved the construction of any of the laws imposing duties on the heads of the executive departments, the Court certainly would not be bound to adopt the construction given by the head of a department." (Syllabus)

United States v. Lynah, 188 U. S. 445, 47 L. Ed. 539 (1902), cited by petitioners is clearly distinguishable. There it was alleged that the Government of the United States "by authority of Acts of Congress raising the said Savannah River three feet at the point of and above said obstruction". Here the petitioning officials were specifically limited to operating in accordance with State law and were prohibited by the Central Valley Projects Acts from depriving the riparian and

overlying landowners of their riparian rights between Friant and Gravelly Ford Canal.

> "9.(a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford;* * * *." (emphasis ours)
>
> *Wolfsen v. United States,* 162 F. Supp. 403, 410 (1958).

The determination of what riparian rights the respondents have and the amount of water sufficient to satisfy them is a judicial and not an administrative determination.

> "* * * what is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance by the Court.*" (emphasis ours)
>
> *Gin S. Chow v. City of Santa Barbara,* 217 C. 673, 706, 22 P. 2d 5 (1933).

The distinction of other cases relied upon by petitioners is here set forth.

United States v. Kansas City Life Insurance Co., 339 U. S. 799, 70 S. Ct. 885, 94 L. Ed. 1277 (1950), is similarly distinguishable. There the taking was specifically defined and authorized in the congressional plan and the plans of the Army engineers. The plan of

taking provided for a dam of definite height and "raised the river and the creek to 420.4 feet" and maintained the water level continuously at that level. We quote from the case:

> "* * *, the dam raised the river and the creek to 420.4 feet and maintained the water continuously at that level, this destroyed the agricultural value of the respondent's land at surface elevations between 423.5 and 425 feet."
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> *United States v. Kansas City Life Insurance Co.*, 339 U. S. 799, 802, 70 S. Ct. 885, 887, 94 L. Ed. 1277 (1950).

United States v. Willow River Power Co., is also clearly distinguishable. In that case "in pursuance to a congressional plan" raised the water level three feet below the power company's power dam" thus "reducing the operating head by three feet * * * and diminished the plant's capacity to produce electric energy".

> "* * *. Thus the water level maintained by the Government in the St. Croix was approximately three feet above its ordinary high-water level at claimant's property. By thus raising the level at which tail waters must flow off from claimant's plant, the Government reduced the operating head by three feet, using ordinary high water as the standard, and diminish the plant's capacity to produce electric energy."
>
> *United States v. Willow River Power Co.*, 324 U. S. 499, 501, 65 S. Ct. 761, 763, 84 L. Ed. 1101 (1945).

That was a definite and certain plan of taking under eminent domain approved by Congress which was not the case here.

In the present case the Central Valley Project as authorized by Congress specifically provided that the riparian and percolating water rights of respondents between Friant and Gravelly Ford Canal which are in both the county of origin and watershed of the San Joaquin River were not to be taken, as clearly shown by the decisions of the courts, the reports of petitioners to Congress and the Acts of Congress itself. We quote but a few of these.

> "9. (a) Defendant's plan, as modified contemplated among other things, that the United States should eventually store and divert to nonriparian use the waters of the San Joaquin River originating above Friant Dam and formerly flowing at or below Gravelly Ford, except for releases from Friant which would be for one or more of three purposes: (1) *to satisfy riparian rights between Friant and Gravelly Ford*; * * *" (emphasis ours)
>
> *Wolfsen v. United States,* 162 F. Supp. 403, 410 (1958).

> "66. In addition to respecting all existing water rights, the Bureau in this report has complied with California's county-of-origin legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus waters will be exported elsewhere. Next in importance after the areas having water rights and the counties of origin are the areas now under irrigation systems but needing supplemental water.

The water requirements of such areas have also been given priority over the needs of new areas."

R. 2285, Pltf. Ex. 136, Central Valley Basin, a Comprehensive Departmental Report on the Development of the Water and Related Resources of the Central Valley Basin, and Comments from the State of California and Federal Agencies. Senate Document 113, 81st Congress, 1st Session, August, 1949.

"Finally, in order to determine from the above a difinite figure for the project irrigation supply in the Southern San Joaquin Valley, consideration must be given to the water commitments downstream on the San Joaquin River, and to evaporation and seepage losses.

"There are certain existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool, water needed for preservation of fish life and waterfoul, and losses from evaporation and seepage in the reservoirs and canals, *it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements.*"

R. 2284, Pltf. Ex. 121, Page 708 of Hearings on Senate Bill S-912, 80th Congress, 1st Session, Hearings before a subcommittee of the Committee on Public Lands United States Senate.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICAN IN CON-

GRESS ASSEMBLED, that the Central Valley Project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby *reauthorized* * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the USE OF WATER IN ACCORD WITH STATE WATER LAWS, INCLUDING BUT NOT LIMITED TO SUCH LAWS GIVING PRIORITY TO COUNTIES AND AREAS OF ORIGIN FOR PRESENT AND FUTURE NEEDS." (emphasis ours)

Act of October 14, 1949, 63 Stat. 852, 853.

Likewise, in *United States v. Cress*, 243 U. S. 316, there was a definite authorization by Congress authorizing the construction by the Government of certain locks and dams upon the Cumberland and Kentucky Rivers in aid of navigation water level below a mill dam to within one foot of the top of the dam which turned his mill. Here again was a definite certain plan upon which the court could and did find constituted a taking by eminent domain. This is pointed out by *United States v. Willow River Power*, 324 U. S. 499, 65 S. Ct. 761, 84 L. Ed. 1101 (1945). In the present case the petitioners were expressly prohibited from taking the riparian and percolating water rights between Friant and Gravelly Ford Canal. To make the present case comparable to the *Cress* case would be like assuming Congress had specifically prohibited Govern-

ment officers from interfering with the water level in the Kentucky River under the plan of Congress set forth in the *Cress* case.

Congress in the *Lynah* case had specifically approved the report of the Secretary of War setting forth the height of the dams, the height of water in the river which did raise the water in plaintiff's planatation eighteen inches and completely "destroyed the land for the purpose of rice culture or any other known agriculture". Here again Congress specifically approved the construction of the dam definitely raising the water over the person's land taken by eminent domain to a point where it could be ascertained in inches and which completely destroyed his land for rice raising or any other agricultural purpose.

In the present case, as shown, petitioners were expressly prohibited from interfering with or taking respondents' rights between Friant and Gravelly Ford Canal.

United States v. 2648.31 Acres of Land in Charlotte Co., 218 F. 2d 518 (1954) was not a proceeding in eminent domain but a proceeding to condemn flowage easements. In that case the declaration of taking included "a shoring of the contour of the lands which would be in any way affected by the construction" which would occasionally inundate the land of the defendant between the 310 and 320 foot contours, again being a decision of a taking under a definitely announced and precisely measured plan although the land would only be flooded occasionally at these levels—something entirely distinct from the present case where petitioners not only were *not* authorized to take respond-

ents' rights but were *specifically prohibited* from doing so by Congress.

In their answer the petitioners in effect asked for a physical solution when they asked the Court "that channelization of the said San Joaquin River be made so as to reduce the quantity of water to be discharged from Friant Dam in order to supply said riparian lands with said quantity of water," to determine "which lands described in plaintiffs' complaint are riparian to the San Joaquin River and are entitled to a reasonable quantity of water for irrigation and domestic use therefrom", and which lands had their underground water stratas charged and recharged from the San Joaquin River, and that the Court decree that the "lands found to be riparian to the San Joaquin River or supplied with underground water from the river shall be entitled to a reasonable quantity of water for beneficial use thereon for irrigation and domestic purposes" and "That a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on the San Joaquin River" up to the full natural flow of the river and that beyond Gravelly Ford Canal there should not be more than five second-feet. The plan of petitioners was to practically cut off the flow of the river entirely *below Gravelly Ford Canal* but to recognize and furnish all of the riparian and overlying rights of the respondents with a flow of the river which could under petitioners' pleadings amount to the entire natural flow of the San Joaquin River below Friant Dam as was to be determined by the District Judge. In other words petitioners by their answer admitted there was to be no taking by eminent domain but that respondents were to have all needed water

and that the trial Court was to determine the legal rights of respondents, and petitioners further asked the Court to decree the amount of water to which respondents were entitled.

In other words, here it was not to be a complete taking, nor a partial taking, but no taking of the water rights of the respondents between Friant and Gravelly Ford Canal. We quote in full the prayer of the answer of petitioners:

"Wherefore, these defendants pray:

"1. That this Honorable Court determine which lands described in plaintiffs' complaint are riparian to the San Joaquin River and are entitled to a reasonable quantity of water for irrigation and domestic use therefrom.

"2. That this Honorable Court determine which lands described in plaintiffs' complaint on file herein have their underground water strata charged and recharged from the San Joaquin River.

"3. That this Honorable Court determine that the lands found to be riparian to the said San Joaquin River shall be entitled to a reasonable quantity of water for beneficial use thereon for irrigation and domestic purposes, and that sufficient water be allowed to flow in the San Joaquin River to furnish said riparian owners with said supply of water by the use of reasonable means of diversion from the said San Joaquin River by pumps, and further determine that channelization of the said San Joaquin River be made so as to reduce the quantity of water to be discharged from Friant Dam in order to supply said riparian lands with said quantity of water.

"4. That this Honorable Court determine and adjudge that a live stream shall be maintained at all times between Friant Dam and Gravelly Ford on said San Joaquin River, which said live stream shall at no time be required to be in excess of the natural flow of the San Joaquin River if Friant Dam were not constructed and in operation, which said live stream shall be for the purpose of supplying the said quantity of water for use upon lands riparian to said San Joaquin River and to supply the underground percolating waters for lands determined to be entitled to a recharge from the San Joaquin River for said underground waters.

"5. That this Honorable Court further determine that at no time a flow of greater than five second feet need pass the downstream boundary of the lowest riparian owner upon said river between Friant Dam and Gravelly Ford.

"6. That the plaintiffs' prayer for injunction be denied.

"7. That the court award to defendants their costs. [989]

"8. That the court grant such other and further relief as is meet and equitable in the premises."

R. 145-147.

Petitioners by their answer in requesting the *Court* to make the above determinations as stated also recognize that the determination of which lands are entitled to water and what constitutes reasonable use of said water are matters of judicial and not administrative determination as clearly set forth in the decisions. (*Gin S. Chow*

v. City of Santa Barbara, 217 C. 673, 22 P. 2d 5 (1933).

In other words, if petitioners admit that they wanted respondent riparian and overlying landowners, including the City of Fresno, between Friant Dam and Gravelly Ford Canal to retain their rights to water and at the same time ask the Court to determine what those rights are, it is impossible to contend that petitioners, as erroneously claimed by opposing counsel, intended to take these rights by eminent domain.

Finally, by filing applications to appropriate the surplus waters flowing past the lands of respondents (California Water Rights Board Decision No. D 935, *supra*) as required by law without any cost to the Government for the 309,500 acre-feet of surplus water flowing past the lands of respondents and accepting a permit to do so from the California Water Rights Board *subject to the vested rights of respondents*, petitioners clearly, finally and conclusively negative the claim of opposing counsel that they were taking these rights by eminent domain or that respondents would be entitled to collect money for these surplus waters which they could and did take without charge. It is submitted that under no possible theory have respondents' riparian and overlying water rights between Friant and Gravelly Ford Canal been taken or could be taken by petitioners under eminent domain.

H. The Determination of the Amount of Water to Which the Riparian and Overlying Owners Between Friant Dam and Gravelly Ford Are Entitled to and What Constitutes a Reasonable Use of Water Is a Judicial and Not an Administrative Decision.

It having been shown that petitioners were never authorized by Congress to take the riparian and overlying percolating water rights of respondents between Friant and Gravelly Ford Canal, it is submitted that the determination of the amount of water respondents were entitled to and what constituted reasonable use of the same was for the Court to determine.

> "What is a useful and beneficial purpose, and what is an unreasonable use is a judicial question depending upon the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question *to be determined in the first instance by the Court.*" (emphasis ours)
>
> *Gin S. Chow v. City of Santa Barbara*, 217 C. 673, 22 P. 2d 5 (1933).

Since as has been conclusively shown, petitioners were not authorized by Congress to take respondents' percolating and riparian rights between Friant and Gravelly Ford nor those of respondent City of Fresno as shown above it was for the District Court to determine the amount of said rights and since as shown in this chapter of this brief that illegal acts of petitioners do not constitute a taking by eminent domain there therefore has been no taking of these rights.

I. Assuming This Action Is a Suit Against the United States as Claimed by Petitioners, Nevertheless the United States Has Waived Its Immunity to Suit in This Action.

As was clearly stated by the Court below, the United States in this case, though a necessary party, is not an indispensable party to obtaining relief against the petitioning officials of the Bureau of Reclamation, and a judgment in this case against said petitioners would not be *res judicata* against the United States.

"The United States is a necessary party to the doing of complete relief, though it would not be an indispensable party to the obtaining of relief only against the defendant officials.

"* * *.

"* * *. In *Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525, the Supreme Court sustained the use of a Court's injunctive process to enforce water rights, though in doing so, it necessarily decided that the United States did not own the water, * * *. In granting relief in this case against the defendant officials alone without the United States as a party, a decree would not be res judicata against the United States. Complete relief, and the settling of this question for all time, required that the United States be made a party when that became possible. The relief to be had may not be the same against the United States as against the defendant officials, though the question to be determined remains the same."

Rank v. (Krug) United States, 142 F. Supp. 1, 78, 79, R. 22.

The question of whether the United States has waived its immunity to suit is set forth at pages 116 to 138 of Brief of Petitioners in the companion case now before this Court, (*City of Fresno v. State of California, United States of America, et al.*, No. 51, October Term 1962.) which argument set forth at said pages is included by reference in this brief.

In this regard it is submitted that the Court below erroneously ruled that all parties had not been joined.

It is again submitted that if there are any other owners of water rights or other parties who should be brought into this case—if any there be—they could easily be ordered brought into this case by this Court at this time. It would be extremely unfair and unjust after the huge expenditure of time and money in this case to dismiss this suit against the United States and possibly start over again. As was stated by the Supreme Court in *Mullaney v. Anderson, infra:*

> "* * *. To dismiss the present petition and require the * * * plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration * * *."
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).
>
> "* * *. Rule 21 of F. R. C. P. 28 U. S. C. A. authorizes the addition of parties 'by order of the court on motion of any party or of its own initiative *at any stage of the action* and on such terms as are just.'" (emphasis ours)
>
> *Mullaney v. Anderson*, 342 U. S. 415, 417, 72 S. Ct. 428, 430, 96 L. Ed. 458 (1952).

It is therefore submitted that the reason given by the Court below for holding that the named plaintiffs could not represent the class action is in error and that the immunity of the United States under the Act of July 10, 1952, 66 Stat. 560, had not been waived in this case was clearly in error.

J. The Petitioners Cannot Raise Points Here That They Did Not Raise in Their Petition for Certiorari.

At a footnote on page 22 of petitioners' brief appears the following:

> "The court below also held, relying on *Hynes v. Grimes Packing Co.*, 337 U. S. 86, and Williams v. Fanning, 332 U. S. 490, that the Secretary of the Interior was not an indispensable party to this proceeding because the decree does not require affirmative action on his part. In so ruling the court plainly erred. It is clearly the Secretary, in whom Congress has vested responsibility over the project (see p. 25, *infra*), who must decide which branch of the decree to follow, and either branch would call for action (terminating reclamation operations at Friant or constructing new facilities) that only he could authorize."

However, petitioners did not raise this point in their petition for certiorari as required by Rule 23(c) of this Court and therefore it cannot be raised here. *Tennessee Coal Co. v. Muscoda*, 321 U. S. 590, 593, 64 S. Ct. 698, 88 L. Ed. 949 (1944).

Had this point been in issue, respondents could have cited in addition to the authorities of *Hynes v. Grimes Packing Co.*, 337 U. S. 86, and *Williams v. Fanning*,

criticized in a footnote at page 22 of petitioners' brief, the later case of *Shaugnessy v. Pedreiro*, 349 U. S. 48 from which we quote:

> "8. Federal Civil Procedure. Section 203. *Indispensability of parties may be determined on practical considerations.*
>
> "9. Declaratory Judgment. Section 304. Where joining Commissioner of Immigration and Naturalization as additional party defendant in alien's action against District Director of Immigration and Naturalization for District of New York, *might result in compelling alien to go to District of Columbia in order to contest deportation in his action* for declaratory relief, Commissioner was not an indispensable party. Administrative Procedure Act. Section 10, 12, 5 U.S.C.A. Section 1101 et seq." (Syllabus) (emphasis ours)
>
> *Shaugnessy v. Pedreiro*, 349 U. S. 48, 75 S. Ct. 591, 99 L. Ed. 868 (1955).

K. Decrees of Physical Solution Under the Central Valley Project Act Have Been Approved by This Court.

Prior to 1928 in California a riparian or overlying percolating water owner could claim the full flow of the river past his property irrespective of whether he could put the flow to beneficial use. *Herminghous v. Southern California Edison Company*, 200 C. 81, 252 P. 607 (1926); *Miller v. Bay Cities Water Co.*, 157 C. 256, 107 P. 115, 27 L. R. A., N. S. 772 (1910). The Central Valley Project could not have been built under such a law as set forth in these decisions.

In 1928 in order to make the Central Valley Project a reality and to avoid the effect of *Herminghaus*

v. Southern California Edison Company, supra, the people of the State of California amended the California Constitution (Art. XIV, Sec. 3; see page 16 of Appendix to this brief). Under this amendment the right of a California riparian owner was limited to that amount of water flowing past his riparian land which he could beneficially use by reasonable methods of diversion. The remaining water in the river became subject to appropriation *without cost* by appropriators like the United States under the Central Valley Project.

A physical solution has been well defined by the Court below as follows:

> "'The matter of a physical solution becomes a practical problem which will vary with each case. That practical problem is best stated by the question—how can the utmost beneficial use be made of the waters of the particular stream without invading prior vested water rights. If those prior vested water rights can be preserved and satisfied *by giving them the water to which they are entitled, and at the same time waste can be prevented by reasonable changes in natural physical characteristics then, under the California decisions, the court may solve that problem by the use of its injunctive powers, conditioned upon making those physical changes.* The parties seeking to make an appropriation or to take water, in derogation of prior vested rights, can be enjoined from taking water until those physical changes are made. The efforts of the courts of California in imposing conditional decrees of injunction requiring a physical solution have been to, as near as possible, satisfy

the prior vested right whether riparian or *overlying*, and at the same time make available, for appropriation and reasonable and beneficial use elsewhere all water in excess of that required to satisfy those prior vested rights.'" (emphasis ours)

State v. Rank, 293 F. 2d 340, 344 (1961).

1. Decree of Physical Solution Defined.

"9. The term 'physical solution' as used in California water law apparently contemplates a court-enforced plan for making as much water as possible available, through the construction of dams or canals or other physical or mechanical instruments, to all the lawful claimants of the waters in dispute. * * *. See: Peabody v. City of Vallejo, 1935, 2 Cal. 2d 351, 40 P. 2d 486, 497; Rancho Santa Margarita v. Vail, 1938, 11 Cal. 2d 501, 81 P. 2d 533, 562; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. 1935, 3 Cal. 2d 489, 575, 45 P. 2d 972; City of Lodi v. East Bay Municipal Utility District 1936, 7 Cal. 2d 316, 341, 60 P. 2d 439. See also *Rank v. Krug*, D.C.S.C. Cal. 1950, 90 F. Supp. 773, 803."

State of California v. United States District Court, 213 F. 2d 818, 821 (Footnote 9) (9th Cir.) (1954).

2. This Court and Other Federal Courts Including the Court Below Have Approved the Doctrine of a Physical Solution Many Times.

This Court in affirming the decision of the United States Court of Claims involving the uses of the water of the San Joaquin River under California's Central

Valley Project approved the principle of a decree of physical solution.

> "* * * If * * * one seeks to appropriate the water wasted or not put to any beneficial use, *it is obligatory* that he find some physical solution, at his expense, to preserve existing prior rights, * * *. Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P. 2d 486; City of Lodi v. East Bay Municipal Utility District, 7 Cal. 2d 316, 60 P. 2d 439; Hillside Water Co. v. City of Los Angeles, 10 Cal. 2d 677, 76 P. 2d 681; City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585; Los Angeles Flood Control District v. Abbot, 24 Cal. App. 2d 728, 76 P. 2d 188.
>
> "It would appear that plaintiffs were not deprived of all of their rights as riparian owners by the amendment to the California Constitution. Apparently, they had the right to demand that defendant provide such a *physical solution* as would permit them to continue to receive so much of the waters of the San Joaquin River as they could beneficially use; or, if such a solution was impossible, that they had the right to demand of the defendant compensation for the deprivation of the rights to so much of the water they had formerly received as they could beneficially use." (emphasis ours)
>
> *Gerlach Live Stock Co. v. United States*, 111 Ct. Cls. 1, 81 Aff. 339 U. S. 725, 70 S. Ct. 955, 94 L. Ed. 1231 (1950).

By affirming this case this Court clearly approved the principle that in enforcing the water rights along the San Joaquin River under the Central Valley Project *the*

Court should order a physical solution if possible—it being admitted by the requests of all parties herein for a physical solution, that a physical solution was possible in the present case.

The Court below in three decisions approved a physical solution in this case.[39] In *State of California v. United States District Court*, 213 F. 2d 818, 821 (footnote 9) (9th Cir.) (1954), and in *People of State of California v. United States*, 235 F. 2d 647, 662 (9th Cir.) (1956).[40]

Moreover, the federal courts as stated by the trial Court have long enforced decrees of physical solution requiring the expenditure of money and making physical changes, and since the approval of such a decree by the Supreme Court in *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U. S. 371, 31 S. Ct. 67, 54 L. Ed. 1074 (1910), the power and duty of an equity to do so does not seem to have been questioned in the higher

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[39] "The California courts, confronted with the command of the 1928 Constitutional amendment that water should not be wasted, and also with the guaranties of that amendment that existing water rights be preserved to the extent of their present and prospective * * * decree which for the sake of convenience is called a 'physical solution.'

" 'In essence, such decree is but the conditional injunctive decree of a court of equity. Such decrees in California water rights cases are characteristic examples of the preservation by equity courts of the elements and flexibility and expansiveness so that new remedies may be invented or old ones modified in order to meet the requirements of every case and to satisfy the needs of every progressive social condition.' "

State v. Rank, 293 F. 2d 340, 344 (1961).

[40] "* * *. Perhaps some physical solution by or control under court decree could permit participation by all in the conservation of all flow of the watershed for beneficial use that no drop would waste uselessly into the Pacific."

People of State of California v. United States, 235 F. 2d 647, 662 (9th Cir.) (1956).

courts. In that case the District Court of the Territory of Arizona, in a decree determining the rights of appropriators, appointed a water commissioner, and required a physical solution by giving him the power to:

> "direct the placing of proper gates, dams or other means for the control of the water of said river at the heads of the canals or other points on the banks of said canals as he may direct, at the expense of the parties hereto interested herein, and to make such rules and regulations as he may deem proper and expedient, to be observed by the parties hereto, for the distribution and use of said water."

The Court while remanding the case for further proceeding in connection with a question of *res judicata*, nevertheless held that the decree appointing the water master with the power indicated, "did not transcend the bounds of judicial authority." See also the Ninth Circuit case of: *Gila Valley Irrigation Dist. v. United States*, 118 F. 2d 507 (1941), and *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*, 245 Fed. 9 at 29 (9th Cir.) (1917).

After all, the appointment of a Watermaster by a court for the enforcement of its decrees is essentially no different than the exercise of the power of the federal courts to appoint a receiver, such as for railroads and the like.

In *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 616, 65 S. Ct. 1332, 1350, 89 L. Ed. 1815 (1945), the Court said:

> "There is some suggestion that if we undertake an apportionment of the waters of this interstate

river, we embark upon an enterprise involving *administrative functions beyond our province.* * * *. But the efforts at settlement in this case have failed. A genuine controversy exists. The gravity and importance of the case are apparent. The *difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.*" (emphasis ours)

In the case of *United States v. Angle, Equity No. 30,* in the United States District Court for Northern California the court appointed a water master in a water suit in which the United States was one of the parties.

3. The Large Savings in Water and Money to the United States Under the District Court's Decree of Physical Solution Which Was Approved by the Court Below.

According to respondents' experts the construction of the Court's plan of physical solution would make 309,500 acre-feet of surplus water annually available for appropriation in addition to the 183,500 acre-feet of water necessary to operate the Court's plan of physical Solution [Pltf. Ex. 440-A, Rep. Tr. 23,833].

This water could be appropriated by the United States *without any cost* whatsoever by filing an application to appropriate water with the California Water Rights Board and obtaining a license from said Board to do so. In fact the only way that this water could legally be acquired by the United States is by filing an application to appropriate.[41]

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[41]"The Commissioner concluded that it has been the almost invariable practice of the Bureau *to file notices of appropriations*

However, any permit to appropriate this amount of water would be subject to the vested rights of respondents to all the water necessary to supply their riparian and percolating rights.

"Vested rights were unaffected. All permits and licenses issued by the statutory agency (now the State Water Board) are declared therein to be subject to vested rights. '(Cal. State Water Board, 'Rules, Regulations and Information pertaining to Appropriation of Water in California' (1956); see,

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under state law without regard to whether the stream involved was navigable or non-navigable. Such filings were made pursuant to state law on water rights riparian to at least 13 navigable or probably navigable rivers. This administrative practice is too clear to be contradicted by the Bureau of Reclamation * * *. Moreover, the Commissioner of Reclamation has drawn our attention to recent public statements by Department of Interior officers confirming this practice.

"This Court has often emphasized that weight is to be given to the interpretation of a statute made by the administering agency. See United States v. American Trucking Ass'ns., 310 U. S. 534, 549, 60 S. Ct. 1059, 1067, 84 L. Ed. 1345; National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 130, 64 S. Ct. 851, 860, 8 L. Ed. 1170. This long course of practice by the Bureau of Reclamation resolves any doubts and ambiguities that arise from the history and wording of the statute." (emphasis ours)

United States v. Gerlach Live Stock Co., 339 U. S. 725, 70 S. Ct. 955, 973, 94 L. Ed. 1231 (1950).

"'Sec. 2 (a) *In the interest of comity between the United States of America and the State of California and consistent with the historic policy of the United States of America of Federal noninterference with State water law, the Secretary of the Navy shall promptly comply with the procedures for the acquisition of appropriative water rights required under the laws of the State of California* as soon as he is satisfied, with the advise of the Attorney General of the United States, that such action will not adversely affect the rights of the United States of America under the laws of the State of California.

"'Sec. 3. (c) *For the purposes of this Act the basis, measure, and limit of all rights of the United States of America pertaining to the use of water shall be the laws of the State of California:* * * *."

United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 842 (1958).

Meridian, Ltd. v. City and County of San Francisco, 13 Cal. 2d 424, 450, 90 P. 2d 537, 91 P. 2d 105; Rank v. Krug, D. C., 142 F. Supp. 1)."

United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 821 (1958).

If petitioners are correct in their contention they need not conform to the California laws regarding the taking and appropriation of unappropriated waters but that they can simply take them by eminent domain (which we submit we have shown they cannot) as the District Court found, they would destroy 100,000 acres [R. 939, Finding 26-A], of the finest farm land in the Nation and subject themselves to damages of nearly $100,000,000 and in addition would lose 309,500 acre-feet of water annually.

It is submitted that this "Self Help Theory" of Mr. Veeder, one of the counsel in this case (See *United States v. Fallbrook Irrigation District*, 165 F. Supp. 806 (1958)) would cost the federal treasury hundreds of times what the Court's decree[42] of physical solution in this case would cost so that it cannot possibly be said that the District Court's decree would expend itself on the federal treasury.

Finally, whether it will or will not, or whether or not this suit is a suit against the United States, it is submitted that this Court has determined that under the Central Valley Project it was the duty of the District Court to make a physical solution *(Gerlach Live Stock Co. v. United States, supra)*, and that should and does end petitioners' claim that the District Court's physical solution as approved by the Court below was unlawful.

[42]The cost of the 10 check dams would run about $900,000.

4. The Plans of Physical Solution of the Various Parties Summarized.

In closing our discussion of the legality of the decree of physical solution, for the information of this Court it might be well to point out that the physical solutions requested by the various parties are very similar.

(a) *Plan of Physical Solution of the State of California.*

The State of California originally filed a plan of physical solution which it had requested the District Court to adopt consisting of five check dams of a stationary design to be located as shown on Defendants' Exhibit A-9-A-1, R. 2340, Rep. Tr. 13,361, with a total release of up to 250 second-feet at the height of the irrigation season.

(b) *Plan of Physical Solution of the Bureau of Reclamation.*

The Bureau of Reclamation requested a release of "sufficient water below Friant Dam to meet the demands of the pumpers on the river * * * and to supply * * * the wells beyond the bluffs that are at the present time getting a part of their supply from the river",[43] and admitted the possible necessity of the erection of four check dams located at the site of plaintiffs' dam sites 2, 3, 4, 5 and 8 as shown by Defendants' Exhibit A-9-A-1, R. 2340, Rep. Tr. 13,361, but with a threatened annual release of only approximately 60,000 acre-feet per year [R. 1981] as compared to the actual release made by petitioners in the nine years after the

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[43]Testimony of Leland K. Hill, Rep. Tr. pages 14,835-14,836, January 21, 1953.

completion of the construction of the Central Valley Project of 626,000 acre-feet per year.[44]

(c) *Plan of Physical Solution of Respondents.*

The respondents' plan of physical solution required the construction of twelve collapsible check dams which would take a total annual release of 183,263 acre-feet of water per year [R. 2282, Pltf. Ex. 116, Rep. Tr. 2909], as compared to an annual loss by seepage from the river of 211,000 acre-feet per year.[45]

(d) *Plan of Physical Solution of the Court.*

The Court adopted the respondents' plan of physical solution but reduced the number of check dams to ten which thus should reduce the amount of water required for their operation if we accept respondents' estimate of total releases under respondents' plan of physical solution of approximately 150,000 acre-feet per year for the reduced number of dams. It will thus be observed that this figure closely approximates the total releases which petitioning Bureau of Reclamation officials' own witness Mr. Stoner testified to before Congress.[46]

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[44] 1951-1952, 1952-1953, 1953-1954, 1954-1955, 1955-1956, 1956-1957, 1957-1958, 1958-1959, 1959-1960, U. S. Geological Survey, Water Supply Papers.

[45] R. 1992, Testimony of Harry Barnes.

[46] "*There are certaining existing rights downstream from Friant which have to be supplied. Including the riparian rights on the river between Friant Dam and Mendota Pool*, water needed for preservation of fish life and waterflow, and losses from evaporation and seepage in the reservoirs and canals, it has been determined that 150,000 acre-feet of Class I water must be reserved to meet those requirements." (emphasis ours)

R. 2284, Pltf. Ex. 121, Testimony of U.S.B.R. Engineer Stoner on Hearings before a Subcommittee of the Committee on Public Lands, United States, Senate, 80th Congress, 1st Session on S-912, p. 708, Rep. Tr. 3072.

We submit that it is impossible for petitioners to claim that the physical solution as decreed by the Court which would reduce the present releases of 626,000 acre-feet per year presently being made by the petitioners while this case is pending and undecided to 70,000 acre-feet estimated by petitioners' engineers or at most to the 183,000 acre-feet per year as estimated by respondents' engineer for twelve dams or less water for its ten dams ordered by the District Court could possibly expend itself on the Federal Government.

VII.
CONCLUSION.

It is submitted that the maintenance of this suit is to protect the very life and existence of the City of Fresno, the riparian owners between Friant Dam and Gravelly Ford Canal and the underground percolation water supply of 100,000 acres of valuable land, the majority of which lies in the county producing the greatest volume of agricultural products in the world, and that this Court has said no apology need be made for this litigation involving the Central Valley Project of California.

> "* * *. There have at times been differences, but these are inevitable in the every day implementation of such a giant undertaking."
>
> *Ivanhoe Irrigation District v. McCracken*, 357 U. S. 275, 279-280, 78 S. Ct. 1174, 1178, 2 L. Ed. 2d 1313 (1958).

As to the relief sought we pray as follows:

That this Court reverse the Court below in the matters in which the Court below reversed the District

Court in its decisions in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956) and affirm the decision of the District Court in its entirety in that case; or if this is too broad a prayer we ask this Court to:

1. Affirm the decision of the Court below in all particulars in which it did not reverse the District Court in *Rank v. (Krug) United States*, 142 F. Supp. 1 (1956).

2. Reverse the Court below on the following points:

(a) Reverse the holding of the Court below that respondent Bureau of Reclamation officials can take the riparian and percolating water rights of the landowners between Friant and Gravelly Ford Canal, said reversal to be on the ground that Congress has never authorized a taking of these rights.

(b) Reverse the holding of the Court below that respondent Bureau officials can take either by eminent domain or condemnation the overlying percolating water rights of appellant City of Fresno, said reversal to be on the ground that Congress has never authorized such taking.

(c) Reverse the holding of the Court below that the determination of the statutory limits of authority of respondent Bureau officials is an administrative and not a judicial determination.

(d) Reverse the holding of the Court below that the determination of whether the charge for water to the City of Fresno out of the Central Valley Project is reasonable or unreasonable, arbitrary, capricious or in excess of their statutory authority is an administrative and not a judicial decision.

(e) Reverse the holding of the Court below that the determination of whether rates charged for water by respondent Bureau official to the City of Fresno in excess of $3.50 per acre-foot (Class I irrigation water) is unreasonable, arbitrary, capricious and in excess of the authority of respondent Bureau officials is an administrative and not a judicial determination and that such a determination is a suit against the United States.

(f) Reverse the holding of the Court below that the City of Fresno is not entitled as a matter of judicial determination to purchase necessary water out of the Central Valley Project at rates which are not unreasonable, arbitrary, capricious or in excess of the statutory authority of respondent officials to the extent of the needs of the City of Fresno.

(g) Reverse the holding of the Court below that respondent districts should be relieved of the injunction the District Court imposed on the districts and respondent Bureau officials and sustain the holding of the Court below refusing to dismiss the respondent districts as parties herein.

(h) Reverse the holding of the Court below that the United States has not waived its immunity to suit in this action under the Act of July 10, 1952, 66 Stat. 516, and the Reclamation Act of June 17, 1902, 32 Stat. 388, and other actions of government officials.

(i) Specifically hold that respondent Bureau officials are not authorized by Congress to add a profit to water rates charged cities under reclama-

tion projects in addition to repayment of a proportionate share of construction costs and operation and maintenance costs plus interest at not to exceed 3½ per cent.

(j) Affirm the decision of the District Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956), that any charge to the City of Fresno for water out of the Central Valley Project which has no municipal or domestic priority such as has been offered to the City of Fresno at rates greater than Class I irrigation rates ($3.50 per acre-foot) is unreasonable since no point on designation on points on appeal was made by any respondent and since no point was raised by any respondent on this point in any petition for certiorari in this Court.

(k) Reverse the Court below and specifically affirm the decision of the District Court in *Rank v. (Krug) United States,* 142 F. Supp. 1 (1956), that the City of Fresno is entitled as a matter of right (in accordance with the California watershed and county of origin statutes and the California domestic and municipal priority statutes which the Respondent officials are required to carry out by virtue of the basic reclamation law of 1902 and the various acts of Congress governing the Central Valley Project which provide that the project and particularly Friant Dam shall supply the domestic and municipal water needs of the City of Fresno) to water out of the Central Valley Project sufficient to supply its needs.

In closing we particularly ask that this Court rule (1) that the City of Fresno is entitled to at least 100,000 acre-feet of water out of the Central Valley Project being the amount the petitioners' engineers testified was the minimum needs of the City of Fresno (which amount would now be 40,000 acre-feet in addition to the 60,000 acre-feet contracted to be sold by the Bureau of Reclamation to the City of Fresno at the close of trial of the above-entitled case); (2) that this Court affirm the decision of the District Court and overrule the Court below and decree the price the City should pay for water should not exceed $3.50 per acre-foot; and (3) hold that the owners of riparian and overlying percolating water rights between Friant Dam and Gravelly Ford may not have their rights taken by either eminent domain or condemnation on the grounds that they be in the Watershed and County of origin of the San Joaquin River, that Congress prohibited the taking of these rights and that at no time did petitioners intend to take these rights by eminent domain.

Respectfully submitted,

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CLAUDE L. ROWE,
Attorneys for Respondent City of Fresno.

Dated: December 3, 1962.

APPENDIX "A".

Constitution of the United States.

"Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX "B".

Acts of Congress.

"1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner

aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under otath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

"SECTION 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

Act of March 3, 1877, 19 Stat. 377.

"SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice

of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided,* That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

"* * *.

"SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and *the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws,* and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That *the right to the use of water acquired under the provisions of this Act*

shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (emphasis ours)

Act of June 17, 1902, 32 Stat. 388 at 390 (43 U. S. C. 391).

"Chap. 1631. An Act Providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes.

"* * *

"Sec. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, *and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same* source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken." (emphasis ours)

Act of April 16, 1906, 34 Stats. 116-117.

"Chap. 285.—An Act To create a Federal Power Commission; to provide for the improvement of navi-

gation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

"* * *

"Sec. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Act of June 10, 1920, 41 Stat. 1063 at 1077.

"Subsec. B. That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

Act of December 5, 1924, 43 Stat. 672 at 702.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000

* * * . * * * (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, trans-mountain water diversion and irrigation and reclamation $500,000,000; * * * (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; * * *."

Emergency Relief Appropriation Act of 1935. 49 Stat. 115.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the respective reports hereinafter designated and subject to the conditions set forth in such documents; * * *.

"* * *

"Sacramento River, California; Rivers and Harbors Committee Document Numbered 35, Seventy-third Congress; * * *."

Act of August 30, 1935, 49 Stat. 1028 and 1038.

"Bureau of Reclamation

"* * *

"Central Valley Project, California: For continuation, $6,900,000, to remain available until June 30, 1937, of which $6,000,000 shall be available for construction of Friant Reservoir and irrigation facilities therefrom

in the San Joaquin Basin and $250,000 for administrative expenses (including personal services in the District of Columbia and elsewhere), to be available for the same purposes as those specified for projects included in the Interior Department Appropriation Act for the fiscal year 1937 under the caption 'Bureau of Reclamation' and to be reimbursable under the Reclamation Law: *Provided*, That not to exceed $25,000 may be expended for personal services in the District of Columbia."

Act of June 22, 1936, 49 Stat. 1597 at 1622.

"Sec. 2. That the $12,000,000 recommended for expenditure for a part of the Central Valley project, California, in accordance with the plans set forth in Rivers and Harbors Committee Document Numbered 85, Seventy-third Congress, and adopted and authorized by the provisions of section 1 of the Act of August 30, 1935 (49 Stat. 1028 at 1033), entitled 'An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' shall, when appropriated, be available for expenditure in accordance with the said plans by the Secretary of the Interior instead of the Secretary of War: *Provided*, That the transfer of authority from the Secretary of War to the Secretary of the Interior shall not render the expenditure of this fund reimbursable under the reclamation law: *Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 35 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1622), is hereby reauthorized and declared to be for the purposes of

improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for the reclamation of arid and semiarid lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further*, That, except as herein otherwise specifically provided, the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, pumping plants, transmission lines, and incidental works deemed necessary to said entire project, and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with state agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law, and may acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, water rights, and other property necessary for said purposes: *And provided further*, That the said dam and reservoirs shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power."

Act of August 26, 1937, 50 Stat. 844 at 850.

"(c) The Secretary is authorized to enter into contracts to furnish water for municipal water supply or miscellaneous purposes: *Provided*, That any such contract, either (1) shall require repayment to the

United States, over a period of not to exceed forty years from the year in which water is first delivered for the use of the contracting party, with interest not exceeding the rate of 3½ per centum per annum if the Secretary determines an interest charge to be proper, of an *appropriate share* as determined by the Secretary of that part of *the construction* costs allocated by him to municipal water supply or other miscellaneous purposes; or (2) shall be for such periods, not to exceed forty years, and at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover *an appropriate share of the annual operation* and maintenance cost and *an appropriate share of such fixed charges* as the Secretary deems proper, and shall require the payment of said rates each year in advance of delivery of water for said year * * *." (emphasis ours)

Act of August 4, 1939, Stat. 1187 at 1194.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following works of improvement of rivers, harbors, and other waterways are hereby adopted and authorized, * * *.

"The second proviso in Section 2 of the Act of August 26, 1937 (50 Stat. 844, 850), authorizing the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, is hereby amended to read as follows: '*Provided further*, That the entire Central Valley project, California, heretofore authorized and established under the provisions of the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) and the First Deficiency Appropriation Act, fiscal y[illegible] 1936 (49 Stat. 1622), is here-

by reauthorized * * *, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financial aiding and assisting such undertakings, and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes."

Act of October 17, 1940, 54 Stat. 1198 and 1200.

"(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States dian, of such waters for domestic, municipal, stock wate shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water irrigation, mining, or industrial purposes.

"* * *.

"Sec. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be

deposited in the Treasury of the United States as miscellaneous receipts."

Act of December 22, 1944, 58 Stat. 887 at 889-890.

"*Provided further,* That after January 31, 1949, no part of any appropriation for the Bureau of Reclamation contained in this Act shall be used for the salaries and expenses of a person in any of the following positions in the Bureau of Reclamation, or of any person who performs the duties of any such position, who is not a qualified engineer with at least five years' engineering and administrative experience: (1) Commissioner of Reclamation; (2) Assistant Commissioner of Reclamation; and (3) Regional Director of Reclamation * * *."

Act of June 29, 1948, 62 Stat. 1112 at 1126.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Central Valley project, California, authorized by section 2 of the Act of Congress of August 26, 1937 (50 Stat. 850), is hereby reauthorized to include the American River development as hereinafter described, which development is declared to be for the same purposes as described and set forth in the Act of Congress of August 26, 1937 (50 Stat. 850).

"Sec. 2. * * *.

"Nothing contained in this Act shall be construed by implication or otherwise as an allocation of water and in the studies for the purposes of developing plans for disposal of water as herein authorized the Secretary of the Interior shall make recommendations for the use of water in accord with State water laws including

but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Act of October 14, 1949, 63 Stat. 852 and 853.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the entire Central Valley project heretofore authorized under the Act of October (should be August 26, 1937 (50 Stat. 844, 850), and the Act of October 17, 1940 (54 Stat. 1198, 1199), is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, * * *.

"Sec. 2. The features herein authorized shall include an irrigation canal, * * * so as to permit the most effective irrigation of the irrigable lands lying in the vicinity of said canal and supply water for industrial, domestic, and other beneficial uses for these lands in Tehama, Glenn, and Colusa Counties * * *."

Act of September 26, 1950, 64 Stat. 1036.

"Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water

rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.".

Act of July 10, 1952, 66 Stat. 516 at 560.

"Sec. 2. The Secretary is hereby authorized to negotiate amendments to existing contracts entered into pursuant to section 9, subsection (e), of the Reclamation Project Act of 1939 to conform said contracts to the provisions of this Act.

"Sec. 3. As used in this Act, the term 'long-term contract' shall mean any contract the term of which is more than ten years.

"Sec. 4. Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to, or from

any interstate stream or the waters thereof *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

"Sec. 5. This Act shall be a supplement to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto).

Approved July 2, 1956."

Act of July 2, 1956, 70 Stat. 483 at 484.

"(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal. As amended Dec. 27, 1946, eff. March 19, 1948."

Rule 75(d), Federal Rules of Civil Procedure, (28 U. S. C.)

"(i) *Order as to Original Papers or Exhibits.* Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper."

Rule 75(i), Federal Rules of Civil Procedure, (28 U. S. C.)

APPENDIX "C".

1. California Constitution.

Sec. 3. Conservation of water resources; restriction of riparian rights

"Sec. 3. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which his land is riparian under reasonable methods of diversion and use, or of depriving any appropriator of water to which he is lawfully entitled. This section shall be self executing.

and the Legislature may also enact laws in the furtherance of the policy in this section contained. (Added Nov. 6, 1928.)"

2. California Water Code Sections.

"*State use and control of water.* It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection. (Stats. 1943, c. 368, p. 1606, Section 104.)"

California Water Code Section 104

"*Highest uses of water; domestic; irrigation.* It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation. (Stats. 1943, c. 368, p. 1606. Section 106.)"

California Water Code Section 106

"Policy guiding action on applications. In acting upon applications to appropriate water the department shall be guided by the policy that domestic use is the highest use and irrigation is the next highest use of water. (Stats. 1943, c. 368, p. 1616, Section 1254.)"

California Water Code Section 1254

"*Municipal priority.* The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time. (Stats. 1943, c. 368, p. 1623, Section 1460.)"

California Water Code Section 1460

"Applications; filing; formalities; priority; deligence. The Department of Finance shall make and file applications for any water which in its judgment is or may be required in the development and completion of the whole or any part of a general or coordinated plan looking toward the development, utilization, or conservation of the water resources of the State.

Any application filed pursuant to this part shall be made and filed pursuant to Part 2 of Division 2 of this code and the rules and regulations of the State Engineer relating to the appropriation of water insofar as applicable thereto.

Applications filed pursuant to this part shall have priority, as of the date of filing, over any application made and filed subsequent thereto. Until October 1, 1959, or such later date as may be prescribed by further legislative enactment, the statutory requirements of said Part 2 of Division 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1953, c. 1522, p. 3184, Section 1; Stats. 1955, c. 1248, p. 2282, Section 1.)"

California Water Code Section 10500

"Release and assignment of priority; assignee defined. The Department of Finance may release from priority or assign any portion of any appropriation filed by it under this part when the release or assignment is for the purpose of development not in conflict with such general or coordinated plan. The assignee of any such application, whether heretofore or hereafter assigned, is subject to all the requirements of diligence

as provided in Part 2 of Division 2 of this code. "Assignee" as used herein includes, but is not limited to, state agencies, commissions and departments, and the United States of America or any of its departments or agencies. (Added Stats. 1943, c. 370, p. 1896, as amended Stats. 1951, c. 445, p. 1458, Section 3, operative October 1, 1951.)"

California Water Code Section 10504

"*Restrictions on release or assignment.* No priority under this part shall be released nor assignment made of any appropriation that will, in the judgment of the Department of Finance, deprive the county in which the appropriated water originates of any such water necessary for the development of the county. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 10505

"The construction, operation, and maintenance of the project as provided for in this part is in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions, and the provisions of this part shall therefore be liberally construed to effectuate the purpose and objects thereof. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11126

"The authority and the department shall be regarded as performing a governmental function in carrying out the provisions of this part. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11127

"*Limitations.* The limitations prescribed in Section 11460 and 11463 shall also apply to any agency of

the State or Federal Government which shall undertake the construction or operation of the project, or any unit thereof, including, besides those specifically described, additional units which are consistent with and which may be constructed, maintained, and operated as a part of the project and in furtherance of the single object contemplated by this part. (Added Stats. 1951, c. 1325, p. 3216, Section 1.)"

California Water Code Section 11128

"*Primary purposes.* Shasta Dam shall be constructed and used primarily for the following purposes:

"(a) Improvement of navigation on the Sacramento River to Red Bluff.

"(b) Increasing flood protection in the Sacramento Valley.

"(c) Salinity control in the Sacramento-San Joaquin Delta.

"(d) Storage and stabilization of the water supply of the Sacramento River for irrigation and *domestic use.* (Added Stats. 1943, c. 370, p. 1896.) (emphasis ours)

California Water Code Section 11207

"*Composition; location.* The unit designated as Friant Dam consists of a dam, reservoir, and one or more hydroelectric power plants to be located on the San Joaquin River at or near Friant. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11225

"*Purposes.* Friant Dam shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water sup-

ply of the San Joaquin River, for irrigation and *domestic* use, and secondarily for the generation of electric power and other beneficial uses. (Added Stats. 1943, c. 370, p. 1896.)" (emphasis ours)

California Water Code Section 11226

"*Prior right to watershed water.* In the construction and operation by the authority of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the authority directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11460

"*Exchange of watershed water.* In the construction and operation by the authority of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the authority unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange. (Added Stats. 1943, c. 370, p. 1896.)"

California Water Code Section 11463

3. California Statutes.

"Sec. 4. Said Central Valley Project as hereby authorized shall consist of the following units:

"(1) Kennett Dam. (Now known as Shasta Dam) A dam, reservoir and hydroelectric power plant, or plants, with necessary afterbay and regulatory appurtenant works located on the Sacramento River, at or near Kennett, Shasta County, California; also a transmission line having capacity sufficient to transmit all the electric energy which can be generated at said dam, including substations, transformer stations, and other facilities for the distribution of power from Kennett Dam to a central substation near the city of Antioch, which transmission line shall be located in such manner and along such route as shall enable the most convenient distribution of electrical energy to the load centers traversed thereby, or capable of service therefrom. Said unit is designated as the Kennett Dam, and shall be constructed and used primarily for improvement of navigation on the Sacramento River to Red Bluff, for increasing flood protection in the Sacramento Valley, for salinity control in the Sacramento-San Joaquin Delta, and for storage and stabilization of the water supply of the Sacramento River *for irrigation and domestic use*, and secondarily for the generation of electric energy and *other beneficial uses*. Said dam shall be built to such height, said reservoir shall have such capacity and said power plant or plants shall be of such capacity as the authority shall determine; pro-

vided, that said reservoir shall have a storage capacity of not less than two million, nine hundred and forty thousand acre-feet of water." (emphasis ours)

Statutes of California, 1933, 50th Session, Chapter 1043, 2643, 2645. (Approved by the Governor August 5, 1933; initiative vote of the People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934.)

"(4) Friant Dam.—A dam, reservoir and hydroelectric power plant, or plants, to be located on the San Joaquin River, at or near Friant, Fresno County, California. San Joaquin River. Said unit is designated as Friant Dam, and shall be constructed and used primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use, and secondarily for the generation of electric energy and other beneficial uses. Said dam shall be built to such height, said reservoir shall have such capacity and said power plant, or plants, shall be of such capacity as the authority shall determine; provided, that said reservoir shall have a capacity of not less than four hundred thousand acre-feet of water." (emphasis ours).

Statutes of California, 1933, 50th Session, Chapter 1043, 2643, 2645. (Approved by the Governor August 5, 1933; initiative vote of the People of the State of California of December 19, 1933; officially declared by the Secretary of State on January 8, 1934; effective January 8, 1934.)